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SCHOOL OF LAW

INSTRUCTIONS TO JURIES

BY

WEST VIRGINIA COURTS

AS APPROVED BY THE

SUPREME COURT OF APPEALS OF THE STATE.

COMPILED AND EDITED BY B. H. OXLEY,
OF THE KANAWHA COUNTY BAR.

ONE VOLUME IN TWO PARTS:

PART I. THE LAW OF INSTRUCTIONS.
PART II. FORMS OF INSTRUCTIONS.

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BY

B. H. OXLEY.

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INTRODUCTORY.

The title of this book is its preface and the necessity for this, or a similar work, is suggested on pages 1 and 2.

A few paragraphs explanatory of its general scope and arrangement will suffice.

The space allotted to Part I permits of dealing with general principles only.

In Part II, with rare exceptions, only one form illustrative of each propositions involved, is given, and, as a general rule, the more recent decisions of the Appellate Court are utilized.

Indexes and Tables of Cases.

For convenience, a separate Index and Table of Cases are provided for each Part, those for Part I, preceding it, and those for Part II, following that subject.

Citations.

Authorities, other than those from which the subject matters of the text are taken, will be found in the Table of Cases, and while this is somewhat an innovation, yet it is believed that this plan will prove to be of practical benefit, as it not only furnishes a convenient method of citations, but relieves the text of burdens frequently imposed.

Chapters and Subjects.

Following Part I, and preceding Part II, between pages 76 and 77, will be found a synopsis, by Chapters and Subjects, giving the contents of Part II.

Page References.

Wherever an instruction is copied into the Reports the numbers refer to the pages where found, but when taken from the printed records, references are had to the pages of the Reports where approved.

B. H. OXLEY.

Charleston, W. Va., February 22, 1906.

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Va.; Railroad Co. v. Ampey, 93-108; R. R. Co. v. Shotts, 92-34.

KERR v. LUNSFORD, 31 W. VA. 662.

KING v. JORDAN, 46 W. VA. 106.

64,b. *Certifying the facts and not the evidence not prohibited.*

W. Va.; Johnson v. Burns, 39-658.

KINSLEY v. COUNTY COURT, 31 W. VA. 464.

KLINKLER v. S. & I. CO., 43 W. VA. 219.

58,h. *Exceptions raised in another bill of exceptions.*

W. Va.; Hall v. Hall, 12-21; Zumbro v. Stump, 38-334.

Va.; Brook v. Young, 3 Rand. 106; Crawford v. Jarrett, 2 Leigh. 639; Perkins v. Hawkins, 9 Gratt. 649.

KOONTZ v. KOONTZ, 47 W. VA. 31.

70,j. *Papers purporting to be a part of bills of exceptions.*

W. Va.; Bank v. Showacre, 26-48; Handy v. Scott, 26-710; Hilleary v. Thompson, 11-113; Parker v. Petroleum Co.; 25-108; Pegram v. Stortz, 31-220; Phelps v. Smith, 16-522; Ramsburg v. Erb, 16-788; Winters v. Null, 31-450.

L.

LAIDLEY v. COUNTY COURT, 44 W. VA. 566.

63,a. *Necessity for certifying all the evidence.*

W. Va.; Johnson v. Burns, 39-659; State v. Ziegler, 40-593; Yeager v. Bluefield, 40-484.

LANDERS v. R. R. CO., 46 W. VA. 492.

50,a. *Arguments of counsel—Abuse of privileges—Necessity for instructions as to.*

W. Va.; State v. Chisnell, 36-670.

LIMER v. TRADERS CO., 42 W. VA. 175.

74,h. *Preponderance of evidence—When preponderates against verdict.*

W. Va.; Davidson v. Ry. Co., 41-407; Johnson v. Burns, 39-659.

LIVELY v. BALLARD, 2 W. VA., 496.

LONG v. PERINE, 44 W. VA. 243.

M.

MCDONALD v. COAL CO., 46 W. VA. 186.

46,a. *Colorable evidence—Sound legal propositions.*

W. Va.; Bloyd v. Pollock, 27-75; Carrico v. Ry. Co., 39-100; Clay v. Robinson, 7-349; Industrial Co. v. Schultz, 43-471.

McKELVEY v. RAILROAD CO., 35 W. VA. 501.

McKENDREE v. SHELTON, 51 W. VA. 516.

70,h. *Copy of paper attached to pleadings—Presumptions as to.*

W. Va.; Arnold & Co. v. Slaughter, 36-589; Chapman v. McMillan, 27-220; Gunn v. R. R. Co., 37-424; Ward v. Ward, 40-611.

71,k. *Identification of papers not incorporated in bill of exceptions.*

Same citations as last above.

McMECHEN v. McMECHEN, 17 W. VA. 684.

26,a. *Evidence tending to prove certain facts.*

Va.; Pasley v. English, 10 Gratt. 242; Rea's Admr. v. Trotter, 26 Gratt. 585.

McVEY v. ST. CLAIR CO., 49 W. VA. 412.

21,c. *Instructions which omit any reference to facts.*

W. Va.; Jackson v. Railroad Co., 43-380.

MAXWELL v. KENT, 49 W. VA. 543.

MAYER v. FROBE, 40 W. VA. 248.

68,b. *Necessity for order filing bills of exception.*

W. Va.; Overruling Beck v. Thompson, 31 W. Va. 459., and Pegram v. Stortz, 31-354.

MILLER v. WHITE, 46 W. VA. 68.

MOORE v. DOUGLASS, 14 W. VA. 708.

MORGAN v. FLEMING, 24 W. VA. 187.

65,e. *Compelling trial-courts to sign bills of exception.*

W. Va.; Black v. Thomas, 21-709; Code, Ch. 131, sec. 9;
Douglass v. Loomis, 5-542; Fisher v. City of
Charleston, 17-595, 628.

Va.; Bennett v. Hardaway, 6 Munf. 125; Brooks v. Cal-
loway, 12 Leigh. 446; Jackson v. Henderson, 3
Leigh. 196; Pasley v. English, 5 Gratt. 141;
Taliaferro, v. Franklin, 1 Gratt. 332.

N.

NICHOLAS v. KERSHNER, 20 W. VA. 251.

O.

OCHELTREE v. McCLUNG, 7 W. VA. 233.

OLIVER v. RAILROAD CO., 42 W. VA. 703.

21,a. *Hypothetical instructions—Failure of evidence to establish facts.*

W. Va.; Winkler v. R. R. Co., 12-699.

ORGAN CO. v. HOUSE, 25 W. VA. 65.

OSBORNE & CO. v. FRANCIS, 38 W. VA. 312.

34,a. *Harmless instructions—When harmlessness apparent.*

Va.; Preston v. Harvey, 2 Hen. & Mun. 55.

12,a. *Incomplete instructions—Correcting and curing defective instructions.*

W. Va.; McKelvey v. Railway Co., 35-500.

32,b. *Presumptions as to erroneous instructions.*

W. Va.; McKelvey v. Railway Co., 35-500.

Va.; Hickman v. Breckenridge, 3 Gratt. 127.

P.

PARKER v. BUILDING & LOAN ASSOCIATION, 55 W.
VA. 134.

20,d. *Abstract propositions—Failure to connect with the evidence.*

W. Va.; Reynolds v. Tompkins, 23-229.

PARSONS v. HAROLD, 46 W. VA. 122.

PATTON v. NAVIGATION CO., 13 W. VA. 261.

48,b. *Illegal evidence—Failure to follow with other evidence.*
Va.; Alderson v. Miller, 15 Gratt. 273.

PERRY v. HORN, 22 W. VA. 381.

55,d. *Error appearing on the face of the record—Statute defined.*
W. Va.; Sweeney v. Baker, 13-158.

PHELPS v. SMITH, 16 W. VA. 522.

PRABST v. DRAEUNLICH, 24 W. VA. 356.

58,i. *Exceptions to instructions—Setting out sufficient grounds—
Insufficient grounds.*
W. Va.; Miller v. Rose, 10-291; Shrewsbury v. Miller, 10-
115.

PORTER v. MACK, 50 W. VA. 583.

R.

RAY v. RAILWAY CO., 57 W. VA. 333.

- 1,a. *Reading law to juries prohibited.*
W. Va.; Bloyd v. Pollock, 27-75; Gregory v. R. R. Co., 37-
606; Ricketts v. Railway Co., 33-433.
- 2,c. *Reading reports of decisions giving evidence of facts in-
volved in similar cases prohibited.*
Same authorities as above.
- 2,b. *Reading text books and reports to juries prohibited.*
Same authorities as above.

REESE v. RAILROAD CO., 42 W. VA. 333.

REYNOLDS v. TOMPKINS, 23 W. VA. 229.

RHODES v. RAILWAY COMPANY, 49 W. VA. 495.

26,d. *Inconsistent instructions—Conflicting theories.*
W. Va.; McCreery v. R. R., 43-110; Price v. Ry. Co., 46-538.

ROBINSON v. LOWE, 50 W. VA. 75.

41,a. *Singling out facts—Ignoring material facts.*
W. Va.; Price v. R. R. Co., 46-538.

ROBINSON v. RAILROAD COMPANY, 40 W. VA. 583.

ROBINSON v. WOODFORD, 37 W. VA. 377.

51,c. *Arguments of counsel.*

W. Va.; Bimbley v. Martin, 28-773.

ROWAN & CO. v. HULL, 55 W. VA. 428.

RUFFNER v. HILL, 31 W. VA. 428.

48,a. *Illegal evidence—When party cannot complain of.*

W. Va.; Miller v. Rose, 21-291; Shrewsbury v. Miller, 10-115.

RUTTER v. SULLIVAN, 25 W. VA. 427.

S.

SHEFF v. CITY OF HUNTINGTON, 16 W. VA. 307.

16,b. *Correct assumption of facts.*

W. Va.; Newlin v. Beard, 6-110.

Va.; Blosser v. Harshbarger, 21 Gratt. 214.

SHEPPARD v. INSURANCE CO., 21 W. VA. 370.

19,b. *Abstract questions—Actions of appellate court as to erroneous instructions.*

Va.; Hunter v. Jones, 6 Rand, 54; Pasley v. English, 10 Gratt. 236.

SHREWSBURY v. TUFTS, 41 W. VA. 213.

29,g. *Correcting faulty instructions.*

W. Va.; Ruffner v. Hewett, 7-585.

Va.; Robertson v. Wright, 17 Gratt. 534; Townes v. Burchell, 12 Leigh. 173.

SKEELS v. RAILROAD COMPANY, 3 W. VA. 556.

41,d. *Law applicable to facts.*

W. Va.; Rathbone v. Railroad Co., 1-106.

Va.; Clayton v. Anthony, 6 Rand. 285.

SNOOKS v. WINGFIELD, 52 W. VA. 442.

67,a. *Excluding evidence.*

W. Va.; Maxwell v. Kent, 49-542.

43,a. *Competency of evidence—How determined—Preliminary facts.*

SNYDER v. RAILROAD CO., 11 W. VA. 14.

STATE v. ALLEN, 45 W. VA. 65.

19,a. *Abstract questions—Court not required to instruct as to.*
Va.; Pasley v. English, 10 Gratt. 226.

18,l. *Assumption of facts—Intimation of court's opinion as to facts.*

39,a. *Disregarding testimony of witnesses—Province of courts as to.*

49,b. *Intimation of court's opinion of evidence—Assuming certain things as facts.*

W. Va.; State v. Shores, 31-491.

STATE v. BEATTY, 51 W. VA. 232.

5,b. *Necessity for asking instructions—Degrees of punishment.*
W. Va.; State v. Cobb, 40-718.

STATE v. BETSALL, 11 W. VA. 703.

27,a. *Suppositive instructions—Evidence tending to prove case.*
Va.; Early v. Garland, 13 Gratt. 1; Hopkins v. Richardson,
9 Gratt. 485.

47,b,c. *Uncorroborated evidence—Accomplices—Prohibiting instructions as to.*

W. Va.; State v. Hurst, 11-54.

Va.; Brown's cases, 2 Va. 490; Byrd's cases, 2 Leigh.
769.

STATE v. BINGHAM, 42 W. VA. 239.

28,a,b. *Repeating instructions—Refusal of instructions when others given on same point.*

W. Va.; Kerr v. Lunsford, 31-659.

Va.; Nicholas' cases, 91 Va. 742.

STATE v. BOWYER, 43 W. VA. 102.

74,g. *Weighing the evidence by the appellate court.*

W. Va.; Gilmer v. Sydenstricker, 42-57; State v. Hunter,
37-744.

STATE v. CADDLE, 35 W. VA. 73.

STATE v. CAIN, 20 W. VA. 681.

STATE v. CLARK, 51 W. VA. 458.

STATE v. COBB, 40 W. VA. 718.

6,c. *Degrees of punishment.*

W. Va.; State v. Caddle, 35-73.

Va.; Wormack v. Circle, 29 Gratt. 192.

26,a. *Specific instructions—Necessity for asking and giving.*

Va.; Brook v. Young, 3 Rand. 106; Dejarnette's case, 75 Va. 877; Kitty v. Fitzhugh, 4 Rand. 600; Rosenbaum v. Welden, 18 Gratt. 785.

6,a. *Time for offering instructions—Discretion of trial-courts as to.*

W. Va.; Jarrett v. Stevens, 36-445; State v. Davis, 31-390; Tully v. Despard, 31-973.

Va.; Gibson's cases, 2 Va. Cases, 70; Gwatkin's case, 9 Leigh. 678; Sledd's case, 19 Gratt. 813.

STATE v. COTTRILL, 52 W. VA. 363.

9,a. *Author of instructions—Who regarded as.*

Va.; Gray's case, 92-772.

12,c. *Incomplete instructions—Giving other proper instructions.*

W. Va.; State v. Prater, 52-132.

29,d. *Numerous instructions—Instructions clearly laying down the law.*

W. Va.; State v. Bingham, 42-234.

STATE v. CROSS, 42 W. VA. 253.

STATE v. DAVIS, 52 W. VA. 224.

10,d. *Instructions not justified by the evidence.*

W. Va.; State v. Cain, 20-679; State v. Jones, 20-764; State v. Robinson, 20-743.

STATE v. DICKEY, 46 W. VA. 319.

17,f. *Important and material facts not conceded as true.*

W. Va.; State v. Robinson, 20-714.

Va.; Boswell v. Com., 20 Gratt. 860.

STATE v. DICKEY, 48 W. VA. 325.

2,d. *Opinion of appellate court commenting on the evidence given at a former trial.*

W. Va.; Bloyd v. Pollock, 27-75; Gregory v. R. R., 37-606; State v. Hurst, 11-77.

Va.; Brown v. Com. 86-466; Dejarnette v. Com. 75-867; Doss's case, 1 Gratt. 559.

STATE v. DODDS, 54 W. VA. 289.

41,d. *Giving undue prominence to certain facts.*

W. Va.; McCreery v. R. R., 43-110; Price v. R. R.,
46-538; Webb v. Packet Co., 42-800.

9,b. *What necessary to insert in instructions.*

STATE v. DONAHOO, 22 W. VA. 761.

STATE v. DOUGLAS, 28 W. VA. 298.

STATE v. EVANS, 33 W. VA. 418.

STATE v. GREER, 22 W. VA. 800.

10,c. *Misleading instructions.*

52,a. *Self defence—Character of accused.*

W. Va.; State v. Cain, 20-679.

44,a. *Weight of testimony—Instructions as to prohibited.*

W. Va.; State v. Thompson, 21-741.

STATE v. HARR, 38 W. VA. 59.

64 d. *How objection to evidence made available.*

W. Va.; Gregory v. Ry. Co., 37-606.

STATE v. HATFIELD, 48 W. VA. 561.

37,c. *Competency of witnesses—As to one convicted of felony.*

W. Va.; Code, Chap. 152, Sec. 17.

STATE v. HENRY, 51 W. VA. 284.

59,1. *Proceedings of trial-court—Presumptions as to regularity of.*

W. Va.; State v. Beatty, 51-232.

STATE v. HERTZOG, 55 W. VA. 75.

11,f. *Instructions not adapted to nor based upon the evidence.*

W. Va.; Hutchinson v. Parkersburg, 23-226; Kerr v. Luns-
ford, 31-659; State v. Belknap, 39-427.

STATE v. HURST, 11 W. VA. 54.

49,c. *Intimation of court's opinion of evidence—Influencing the jury.*

Va.; Doss' case, 1 Gratt. 559; Gregory v. Baugh, 2 Leigh.
665; Keel v. Hubert, 1 Wash. 203; McDowell v.
Crawford, 11 Gratt. 405; Rosser v. Gill, 1 Wash. 88.

STATE v. KELLISON, 56 W. VA. 691.

STATE v. KERNS, 47 W. VA. 266.

50,e. *Intimation of court's opinion of the evidence as to guilt of accused.*

W. Va.; Neill v. Produce Co., 38-228; State v. Cobbs, 40-72; State v. Greer, 28-800; State v. Hurst, 11-54; Va.; McDowell v. Coffin, 11 Gratt. 405; Dejarnett v. Com., 75-867.

29,e. *Phases of case not presented in other instructions.*

W. Va.; State v. Allen, 45-66; State v. Cobb, 40-718; State v. Evans, 33-417; State v. Musgrave, 43-672.

STATE v. KINNEY, 26 W. VA. 141.

74,i. *Irrelevant evidence—What authorized, reversal because of admission of.*

Va.; Insurance Co. v. Trear, 29 Gratt. 255; Payne v. Com., 31 Gratt. 855.

STATE v. LOWE, 21 W. VA. 782.

17,d. *Facts admitted or sustained by the evidence.*

W. Va.; Sheff v. City of Huntington, 16-307; State v. Robinson, 20-714.

Va.; McDowell v. Crawford, 11 Gratt. 377.

STATE v. MANNS, 48 W. VA. 480.

24,e. *Instructions not fully stating the law.*

24,d. *Instructions not justified by the evidence.*

W. Va.; State v. Jones, 20-764.

31,c. *Instructions presenting defence and supported by the evidence.*

W. Va.; State v. Cain, 20-679; State v. Kerns, 47-266.

Va.; Honesty's case, 81-283; Jackson v. Commonwealth, 96-107; Parrish v. Commonwealth, 81-1; Stoneman's case, 25 Gratt. 900.

STATE v. McGLUMPHEY, 37 W. VA. 805.

61,c,d. *When bills of exception may be made and tendered.*

W. Va.; Ramsburg v. Erb, 16-778; Smith v. Townsend, 21-486; State v. Miller, 26-106.

STATE v. MICHAEL, 37 W. VA. 565.

STATE v. MORGAN, 35 W. VA. 260.

STATE v. MORRISON, 49 W. VA. 211.

STATE v. MUSGRAVE, 43 W. VA. 672.

STATE v. PERRY, 41 W. VA. 642.

39,b. *Disregarding testimony of witnesses—Province of jury as to.*
W. Va.; State v. Thompson, 21-741.

47,a. *Uncorroborated evidence—Province of jury as to.*

W. Va.; State v. Betsall, 11-740; State v. Cooper, 26-338;
State v. Morgan, 35-273; State v. Thompson, 21-741.

STATE v. PINE, 56 W. VA. 1.

STATE v. POINDEXTER, 23 W. VA. 805.

17,e. *Assumption of facts—State of facts unsupported by the evidence.*

W. Va.; Winkler v. Ry. Co., 12-609.

STATE v. PRATER, 52 W. VA. 133.

12,d. *Incomplete instructions—Giving other proper instructions.*

W. Va.; Clark v. Donaldson, 15-804; Fant v. Lamon, 22-229.

STATE v. ROBINSON, 20 W. VA. 714.

STATE v. SHEPPARD, 49 W. VA. 585.

43,a. *Circumstantial evidence—What necessary for conviction on.*
(Note:—The court in this case holds that, “beyond a reasonable doubt” and “to a moral certainty” are equivalent terms.)

W. Va.; Kerr v. Lunsford, 31-662; State v. Baker, 33-319;
State v. Flanagan, 26-117.

11,g. *Failure of instructions to refer to the evidence.*

Overruling Jarrett v. Stevens, 36 W. Va. 445.

STATE v. SUTPHIN, 22 W. VA. 772.

STATE v. TAYLOR, 57 W. VA. 228.

38,b. *Mistake in not swearing witnesses—Discovery of after verdict.*

W. Va.; State v. Lowry, 42-205; State v. Thompson, 21-741.

49,a. *Intimation of court's opinion of weight of evidence.*

W. Va.; State v. Hunt, 11-75.

Va.; McDowell v. Crawford, 11 Gratt. 405.

49,d. *Same and same authority cited.*

STATE v. THOMPSON, 21 W. VA. 742.

49,a. *Discussion of evidence by the court.*

W. Va.; State v. Hurst, 11-75.

Va.; McDowell v. Crawford, 11 Gratt. 405.

49,d. *Intimation of court's opinion of evidence.*

Citing same authorities as above.

STATE v. THOMPSON, 26 W. VA. 150.

72,a. *Setting aside the verdict—Necessity for motion for.*

W. Va.; Danks v. Rodeheaver, 26-274; State v. Phares, 24-757.

STATE v. TUCKER, 52 W. VA. 421.

STATE v. WELCH, 36 W. VA. 691.

53,c. *Degrees of punishment—Whether murder in first or second degree.*

W. Va.; State v. Robinson, 20-713.

Va.; Willis's case, 32 Gratt. 929.

STATE v. WILLIAMS, 49 W. VA. 220.

STATE v. WOODROW, 58 W. VA. —.

37,b. *Competency of witness—Wife not a competent witness against her husband in a prosecution for crime.*

W. Va.; Code, Chap. 152, Sec. 19.

30,c. *Oral instructions—Refusal of correct written instructions.*

W. Va.; State v. Kerns, 47-266.

Va.; Booth v. Com., 4 Gratt. 525; Morrellick v. Pankly, 91-259; Norfolk Co. v. Marpole, 97-594; Ry. Co. v. Norment, 84-167; Simms v. McConnell, 86-498.

STATE v. ZIEGLER, 40 W. VA. 594.

75,k. *Setting aside the verdict—Wholly insufficient evidence.*

W. Va.; State v. Foster, 21-767.

Va.; Grayson v. Commonwealth, 6 Gratt. 712.

STEWART v. DOAK, 58 W. VA. —.

STORRS v. FEICK, 24 W. VA. 606.

42,c. *Singling out facts—Existence of other facts.*

W. Va.; McMechen v. McMechen, 17-684.

Va.; Beury v. Ensel, 2 Gratt. 333; Dogan v. Leekright, 4 H. & M. 125; Dyerle v. Starr, 28 Gratt. 800.

T.

TAYLOR v. RAILROAD CO., 37 W. VA. 40.

75,l. *Illegal evidence—Presumptions as to.*

W. Va.; Hall v. Lyons, 29-410; Thomas v. Electrical Co., 54-395.

13,b. *Instructions correctly propounding the law.*

W. Va.; Hall v. Lyons, 29-410; Thomas v. Electrical Co., 54-395.

15,h. *Modification of instructions—Harmless modification of proper instructions.*

W. Va.; Blaine v. R. R. Co., 9-253; Sheff v. City of Huntington, 16-307; Washington v. R. R. Co., 17-190.

THOMAS v. ELECTRICAL CO., 54 W. VA. 395.

W. Va.; Johnson v. R. R. Co., 25-570; Ketterman v. R. R. 48-606; Woolwine v. R. R., 36-329.

THOMPSON v. INSURANCE CO., 53 W. VA. 479.

TOMPKINS v. KANAWHA BOARD, 21 W. VA. 224.

TRACEWELL v. COUNTY COURT, 58 W. VA. —.

TRACY v. COAL CO., 58. W. VA. —.

66,l. *Skeleton bills of exception—How made part of the record.*

W. Va.; Gunn v. R. R. Co., 37-421; McKendree v. Shelton, 51-516.

66,j. *Same—Time within which to certify and identify the evidence.*

W. Va.; Same as above.

65,g. *Stenographic reports—How made part of the record.*

W. Va.; Same as above.

TULLEY v. DESPARD, 31 W. VA. 370.

7,d. *Time for offering instructions—Abuse of discretion of trial courts as to.*

W. Va.; Organ Co. v. House, 25-64, 68.

TURNER v. RAILROAD CO., 40 W. VA. 675.

14,f. *Failure to modify instructions.*

W. Va.; Gregory v. R. R. Co., 37-606.

V.

VAN WINKLE v. BLACKFORD, 28 W. VA. 671.

69,f. *Memoranda made on the record book of trial-court.*

W. Va.; Danks v. Rodeheaver, 26-274; Veith v. Salt Co., 51-96.

29,f. *Numerous instructions—Inquiry as to a particular matter.*

W. Va.; Bess v. R. R. Co., 35-442; Land Co. v. Insurance Co., 35-666.

VINAL v. CORE, 18 W. VA. 2.

51,a. *Probable cause—Mixed questions of law and fact—Province of courts as to.*

W. Va.; Snyder v. R. R. Co., 11-34; Washington v. R. R. Co., 17-215.

Va.; Mowery v. Miller, 3 Leigh. 561; Spingle v. Davy, 15 Gratt. 381; Scott v. Schelor, 38 Gratt. 906.

VEITH v. SALT CO., 51 W. VA. 96.

VINTROUX v. SIMMS, 45 W. VA. 548.

73,d. *When the verdict not supported by the evidence.*

W. Va.; Beall v. Ry. Co., 38-526.

W.

WARD v. BROWN, 53 W. VA. 227.

38,a. *Classification of witnesses—Opportunity of witnesses to know the truth.*

W. Va.; Jarrett v. Jarrett, 11-584; Kerr v. Lunsford, 31-659; Nicholas v. Kershner, 20-251.

40,c. *Disregarding testimony of witnesses—Weight of evidence.*

Va.; Tucker v. Sandridge, 75-546.

44,c. *Expert evidence—Connecting with other evidence.*

W. Va.; Jarrett v. Jarrett, 11-584; Kerr v. Lunsford, 31-659.

Va.; Burton v. Scott, 3 Rand. 399; Parraman v. Taylor, 11 Gratt. 220; Simmermann v. Sanger, 29 Gratt. 9; Cheatham v. Hatcher, 30 Gratt. 56 Montague v. Allen, 78-582; Shacklett v. Roller, 99-659.

13,c. *Proper instructions nullified by improper instructions.*

W. Va.; Webb v. Dye, 18-376.

30,a. *Refusal of proper instructions—Effect of refusal.*

W. Va.; Boggess v. Taylor, 47-254; Nicholas v. Kershner, 20-251.

Va.; Bank v. Waddill, 29 Gratt. 451.

WARD v. BROWN, 53 W. VA. 227—Continued.

- 39,b. *Singling out witnesses—When instructions proper in other respects.*

W. Va.; Kerr v. Lunsford, 31-659.

- 45,a. *Specifying weight and value of testimony.*

Va.; Beverly v. Weldron, 20 Gratt. 147; Temple v. Temple, 1 Hen. & Mun. 576; Mercer v. Kelsoe, 4 Gratt. 106.

WARD v. WARD, 47 W. VA. 766.

- 34,b. *Harmless instructions—Presumptions as to.*

W. Va.; Osborn & Co. v. Francis, 38-312.

- 25,b. *Failure of good instructions to cure bad instructions.*

W. Va.; Industrial Co. v. Schults, 43-471; McCreery v. R. R. Co., 43-110; McKelvey v. R. R. Co., 35-501.

WASHINGTON v. RAILROAD CO., 17 W. VA. 215.

- 42,f. *Making specific facts basis of instructions.*

W. Va.; Snyder v. Railroad Co., 11-34.

WATTS v. RAILROAD CO., 39 W. VA. 198.

- 33,c. *Disregarding erroneous instructions.*

Webb v. Packett Company, 43 W. Va., 800.

- 46,b. *Conflicting evidence—Law applicable to different theories.*

W. Va.; Fisher v. R. R., 39-371; Searles v. Railway, 32-370.

Va.; Pasley v. English, 10 Gratt. 236.

WELLS v. SMITH, 49 W. VA. 78.

- 71,m. *Alteration of the record—How record restored—Inserting matter not part of the record.*

W. Va.; Despard v. County, 23-318; Herring v. Lee, 22-661; Koontz v. Koontz, 47-31; Lumber Co. v. Brooks, 46-732; State v. Vest, 21-796.

- 62,h. *Bills of exception—When must be noted, certified and recorded.*

W. Va.; Bank v. Showacre, 26-48; Craft v. Mann, 46-478; Furbee v. Shay, 46-736; Hughes v. Frum, 41-445; Jordan v. Jordan, 48-600; Ketterman v. R. R., 48-606; Koontz v. Koontz, 47-315; Wlokes v. R. R., 14-157.

WERNER v. CALHOUN, 55 W. VA. 247.

- 11,i. *Relevancy of instructions—Directing enquiries as to facts not material.*

Va.; Rosenbaum v. Weeden, 18 Gratt. 785.

WHITE v. BREWING CO., 51 W. VA. 259.

41,e. *Doubtful material facts.*

W. Va.; Ketterman v. Railroad Co., 48-606.

45,e. *Preponderance of evidence—Doubtful material facts.*

Va.; Fisher v. Duncan, 1 Hen. & Mun. 363; Hollingsworth v. Dunbar, 5 Mun. 199; Keed v. Herbert, 1 Wash. 203.

WICKES v. RAILROAD COMPANY, 14 W. VA. 151.

68,a. *Bills of exception—What necessary to make part of the record.*

WINTERS v. NULL, 31 W. VA. 450.

70,g. *Instructions copied into the record—Failure of bills of exceptions to refer to.*

W. Va.; Bank v. Showacre, 26 W. Va., 48.

WOODELL v. IMPROVEMENT COMPANY, 38 W. VA. 23.

Y.

YOUNG v. RAILROAD COMPANY, 44 W. VA. 218.

73,e. *Verdict—How regarded by appellate court.*

W. Va.; Adkins v. Dewitt, 41-229; Sisler v. Shafer, 43-769.

PART I.

THE LAW OF INSTRUCTIONS.

- I. NECESSITY FOR INSTRUCTIONS.
- II. PURPOSE OF INSTRUCTIONS.
- III. LEGAL PRINCIPLES GOVERNING INSTRUCTIONS.
- IV. EXCEPTIONS TO INSTRUCTIONS.

I. NECESSITY FOR INSTRUCTIONS.

- a. Reading law to juries prohibited.
- b. Same—Text books and reports.
- c. Same—Decisions giving evidence or facts involved in similar cases.
- d. Opinion of the appellate court commenting on evidence given at a former trial.

a. **Reading Law to Juries Prohibited.**

Attorneys should argue and apply the facts, and get the law by instructions from the court, if desired. If it is true that the jury is the judge of the evidence, and the court of the law, then it follows that law should not be read to the jury; for if the jury is not the judge of the

law, why read law books to it? *Ray v. Railway Co.*, 57 W. Va. 333.

b. Same—Text Books and Reports.

A court may and should refuse to allow counsel to read law books, either text-books or reports, in addressing the jury, if objected to. *Ray v. Railway Co.*, 57 W. Va. 333.

c. Decisions giving evidence or facts involved in similar cases.

Reading reports of decisions giving evidence or facts involved in decided cases, more or less similar in character, if objected to, should not be allowed, and its allowance, over objection, is reversible error. *Ray v. Railway Co.*, 57 W. Va. 333.

d. Opinion of the appellate court commenting on the evidence given at a former trial.

On a second trial, a party has no right to have read to the jury an extract from an opinion of the appellate court on a former writ of error in the same case commenting on the weight and effect of the evidence given on a former trial, though it be the same evidence on the second trial. *State v. Dickey*, 48 W. Va. 325.

II. PURPOSE OF INSTRUCTIONS.

a. Office of instructions.

It is the object and office of instructions to define for the jury, and to direct their attention to, the legal principles which apply to, and govern, the facts proved or presumed in the case. The instructions should simply

develop the rules of law governing the particular facts,—all the facts,—not a part only, which the evidence tends to establish; and they are to be interpreted and judged of, not in any abstract way, but with reference to those facts. *State v. Dodds*, 54 W. Va. 289.

III. LEGAL PRINCIPLES GOVERNING INSTRUCTIONS.

1. BASES FOR INSTRUCTIONS.
2. NECESSITY FOR ASKING INSTRUCTIONS.
3. TIME FOR OFFERING INSTRUCTIONS.
4. DUTY OF COURTS TO INSTRUCT AS TO THE LAW.
5. RIGHT OF PARTY TO HAVE INSTRUCTION GIVEN IN HIS OWN LANGUAGE.
6. HOW INSTRUCTIONS TO BE TAKEN AND READ.
7. RELEVANCY OF INSTRUCTIONS.
8. INCOMPLETE INSTRUCTIONS.
9. MODIFICATION OF INSTRUCTIONS.
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11. ASSUMPTION OF FACTS.
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23. REFUSAL OF PROPER INSTRUCTIONS.
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44. ISOLATED PORTIONS OF EVIDENCE.
45. INADMISSIBLE OR ILLEGAL EVIDENCE.
46. INTIMATION OF COURT'S OPINION OF EVIDENCE.
47. ARGUMENTS OF COUNSEL.
48. PROBABLE CAUSE.
49. EXISTENCE OF MALICE.
50. SELF-DEFENSE.
51. CHARACTER OF ACCUSED—CHARACTER OF VICTIM.
52. DEGREES OF PUNISHMENT.

1. BASES FOR INSTRUCTIONS.

a. Foundation in the evidence for instructions.

An instruction, though correct in law, should be refused unless there is a basis for it in the evidence, and it is the province of the court to determine whether there is a foundation in the evidence for any particular instruction. *Parker v. Building Asso.*, 55 W. Va. 134.

2. NECESSITY FOR ASKING INSTRUCTIONS.

a. Request for and refusal of instructions.

b. Same—As to degrees of punishment—Silent record.

a. Request for and refusal of instructions.

A verdict will not be disturbed for want of a proper instruction, unless it was requested and refused, nor for failure of the trial-court to so modify an improper instruction requested so as to make it proper and then give it, unless it can be seen that such failure, for some reason, such as other incomplete instructions given, may have prejudiced the party requesting it. *Werner v. Calhoun*, 55 W. Va. 247.

b. Same—As to degrees of punishment—Silent record.

The court is not bound to instruct the jury, in a murder case, that if they find the defendant guilty of first degree murder they may recommend in the verdict that he be confined in the penitentiary, and thus avert the infliction of the death penalty, unless the prisoner requests such instruction. When in such case the record is silent as to the asking, giving or refusal of such instruction, it

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is conclusively presumed that, if requested by the prisoner, it was given, and if it was not requested, that he waived it. *State v. Beatty*, 51 W. Va. 232.

3. TIME FOR OFFERING INSTRUCTIONS.

- a. Discretion of trial-courts as to.
- b. Rules of trial-courts as to.
- c. Degrees of punishment.
- d. Rights of counsel as to—Abuse of discretion
 by trial-courts.
- e. Same.

a. Discretion of trial-court as to.

The law does not fix any time for giving instructions. The court may fix it by rule. *State v. Cobbs*, 40 W. Va., 718.

b. Rules of trial-courts as to.

A rule of a circuit court "that instructions to a jury will not be entertained or considered, unless submitted before the conclusion of the argument of the case," is a reasonable rule and tends to the promotion of justice and should be enforced, unless in a particular case there exist peculiar circumstances, which would render the enforcement of this rule unjust to one of the parties, and in such a case, the court ought to disregard the rule and grant or refuse instructions though asked too late under the rule. *Organ Co. v. House*, 25 W. Va. 65.

c. Degrees of punishment.

It is not error for a court to omit to instruct a jury that murder in the first degree may be punished either with

death or by confinement in the penitentiary, unless asked to do so.

It is error to refuse to do so when asked, though not asked till the jury has announced its verdict, but before its discharge. *State v. Cobbs*, 40 W. Va. 718.

d. Right of counsel as to—Abuse of discretion by trial-courts.

It is the legal right of counsel on the trial to submit instructions to the jury, and have them passed upon by the court; but where instructions are submitted by counsel after the jury had been directed to retire, and the court refused to consider them because offered too late, this court will not reverse the judgment of the trial-court, unless it affirmatively appears that the said court manifestly abused the large discretion vested in it in respect to its action in the matter. *Tully v. Despard*, 31 W. Va. 370.

e. Same.

It is the right of counsel to submit instructions and have them passed upon by the court; but where they are submitted after the jury have retired, and the court refuses to receive them, this court will not reverse the trial-court, unless it affirmatively appear that it manifestly abused its large discretion in such a matter. *Jarrett v. Stevens*, 36 W. Va. 446.

4. DUTY OF COURTS TO INSTRUCT AS TO THE LAW.

a. Duty of courts to instruct when asked to do so.

It is the plain duty of a trial-court, when asked to do so, by either party, to instruct the jury on questions of law

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involved in the case, when it can thereby aid them in reaching a right conclusion and proper verdict. *Davis v. Webb*, 46 W. Va. 6.

5. RIGHT OF PARTY TO HAVE INSTRUCTIONS GIVEN IN HIS OWN LANGUAGE.

- a. Qualifications as to.
- b. Same.
- c. Same.

a. Qualifications as to.

A party has a right to have his instruction given in his own language, provided there are facts in evidence to support it, that it contains a correct statement of the law and is not vague, irrelevant, obscure, ambiguous, or calculated to mislead. *State v. Evans*, 33 W. Va. 418.

b. Same.

A party has the right to have the opinion of the court as to the law upon a given state of facts, though they do not cover the whole ground of the case, and he has the right to have an instruction in his own language, if clear, intelligible and properly propounding the law. *Parsons v. Harrold*, 46 W. Va. 128.

c. Same.

A party has the right to have an instruction given in his own language, if pertinent, unambiguous and correct in law. *Jordan v. Benwood*, 42 W. Va. 313..

6. HOW INSTRUCTIONS TO BE TAKEN AND READ.

- a. Author of instructions—Who regarded as.

- b. What not necessary to insert in.
- c. How construed—Stating the law correctly.

a. Author of instructions—Who regarded as.

All instructions given are instructions of the court, regardless of who requests them, and are to be considered together. *State v. Cottrell*, 52 W. Va. 363.

b. What not necessary to insert in.

The instructions given to the jury must be taken together; and it is not necessary to insert in each separate instruction all the exceptions, limitations and conditions which are inserted in the instructions as a whole. *State v. Dodds*, 54 W. Va. 289.

c. How construed—Stating the law correctly.

Instructions to the jury must be taken and read as a whole, and if, upon being so read and construed, they state the law correctly, and do not misstate it in any particular, and no proper instruction, asked for has been refused, the verdict will not be disturbed on the ground that additional proper instructions could have been given, or that some particular instruction, standing alone, might tend to mislead the jury. *State v. Kellison*, 56 W. Va. 691.

7 RELEVANCY OF INSTRUCTIONS.

- a. Relevant instructions defined.
- b. Who to determine as to relevancy of.
- c. Misleading instructions.
- d. Instructions not justified by the evidence.
- e. Instructions not applicable to the evidence.

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- f. Instructions not adapted to nor based upon the evidence.
- g. Failure to refer to the evidence.
- h. Correct abstract propositions of law.
- i. Directing enquiries as to facts not material.

a. **Relevant Instructions defined.**

An instruction should not be given unless relevant, and it is not relevant unless there was evidence tending to prove the facts, on which the instruction is based. *Kerr v. Lunsford*, 31 W. Va. 663.

b. **Who to determine as to relevancy of.**

It is for the court to determine whether there is evidence to render an instruction relevant. An instruction cannot be given and its consideration by the jury made to depend upon whether the jury find that there is, or is not such evidence. *Rowan & Co. v. Hull*, 55 W. Va. 336.

c. **Misleading instructions.**

An instruction must be relevant to the evidence in the case; if it is not and is calculated to mislead the jury, it is error to give it. *State v. Greer*, 22 W. Va. 801.

d. **Instructions not justified by the evidence.**

It is not error to refuse instructions not justified by the evidence. *State v. Davis*, 52 W. Va. 224.

e. **Instructions not applicable to the evidence.**

It is not error for the court to refuse to give an instruction when it is irrelevant, or not applicable to the evidence. *Campbell v. Hughes*, 12 W. Va. 184.

f. Instructions not adapted to nor based upon the evidence.

It is not error to refuse an instruction not especially adapted to nor based upon the facts of the case, which the evidence fairly tends to prove. *State v. Hertzog*, 55. W. Va. 75.

g. Failure to refer to the evidence.

It is essential to maintain the distinction between juridical and moral truth, and it is error to give an instruction in which there is no reference to the evidence in the case.

The jury can found their belief upon nothing but the evidence, and instructions ought not to be so drawn as to leave it open to the jury to base it upon anything else. *State v. Sheppard*, 49 W. Va. 585, 606.

h. Correct abstract propositions of law.

A court ought not to grant an instruction irrelevant to the case, though as a proposition of law it may, in the abstract, be right. *State v. Thompson*, 21 W. Va. 742.

i. Directing enquiries as to facts not material.

It is proper for the trial-court to refuse instructions so framed as to direct enquiries by the jury as to facts not material or relevant to the issue, as their tendency is to mislead and confuse the jury. *Werner v. Calhoun*, 55 W. Va. 247.

8. INCOMPLETE INSTRUCTIONS.

- a. Correcting or curing defective instructions.
- b. Withdrawal of bad instructions.

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c. Giving other proper instructions.

d. Same.

a. Correcting or curing defective instructions.

The general rule is that the court may cure errors in its instructions by withdrawing, explaining or correcting them. When a material instruction is given, that is erroneous, it should be effectively withdrawn. *Osborne & Co. v. Francis*, 38 W. Va. 319.

b. Withdrawal of bad instructions.

A bad instruction is not cured by a good instruction, though they be given on the motion of adverse litigants. The bad instruction should be withdrawn. *McKelvey v. Railway Co.* 35 W. Va. 501.

c. Giving other proper instructions.

When an instruction is incomplete in not going far enough to put the law upon its subject, but other instructions do state the law omitted, and taken together they properly state the law upon the subject, no error can be based on the defect of such instruction to reverse the judgment, as the other instruction cures the defect in it. *State v. Cottrell*, 52 W. Va. 363.

d. Same.

When an instruction given is incomplete, but states the law correctly as far as it goes, and the omitted part is supplied by other instructions given, such omission is not error. *State v. Prater*, 52 W. Va. 133.

9. MODIFICATION OF INSTRUCTIONS.

a. Instructions properly drawn and requested.

- b. Instructions correctly propounding the law.
- c. Proper instructions nullified by improper instructions.
- d. Same—Right of party affected, to benefit of exceptions.
- e. Modification of improper instructions—Giving other instructions.
- f. Failure to modify instructions.
- g. Explaining the meaning of instructions.
- h. Harmless modification of proper instructions.

a. Instructions properly drawn and requested.

When an instruction is properly drawn and requested, the court must give it, without modification, either by an interpolation in that instruction, or by giving another, having the effect of such modification. *Ward v. Brown*, 53 W. Va. 255.

b. Instructions correctly propounding the law.

Although an instruction propounds the law correctly, and the court modifies it, the judgment will not be reversed for that reason, unless the modification was to the prejudice of the exceptor. *Tompkins v. Kanawha Board*, 21 W. Va. 224.

c. Proper instructions nullified by improper instructions.

When a proper instruction is asked and given, it is error to give another improper instruction which modifies it and nullifies its effect or obscures its meaning. *Ward v. Brown*, 53 W. Va. 228,

d. Same—Right of party affected, to benefit of exceptions.

When the court gives erroneous instructions at the in-

stance of one party, and refuses a proper one asked for by the other party, and afterwards gives, at the instance of the second party instructions embodying the erroneous propositions contained in the instructions given for the first party, the action of the court in respect to the instructions of the second party is tantamount to an erroneous modification of the second party's proper instruction, and he is not estopped from complaining of the action of the court. *State v. Pine*, 56 W. Va. 1.

e. Modification of improper instructions—Giving other instructions.

If an instruction asked does not correctly expound the law the court, as a general rule, may refuse to give it, and it is not bound to modify it, or give another instruction in its place. *Gas Co. v. Wheeling*, 8 W. Va. 323.

f. Failure to modify instructions.

If it plainly appear that a party could not have been injured by the modification of an instruction asked, even though the modification was unnecessary, the failure to give such instruction without such modification is not sufficient cause for reversal of the judgment. *Turner v. Railroad Co.*, 40 W. Va. 676.

g. Explaining the meaning of instructions.

Where an instruction is ambiguous and equivocal, and would not readily be comprehended by the average jurymen, the court should refuse to grant it, if by granting it the jury might be misled; but, if it be correct upon one construction of it, the court should properly modify it so as to remove the ambiguity, and make it clearly intelligible to the jury, and, after such modification, to grant

it, or the court should grant it, with an explanation giving it the meaning which will make it proper. *Carrico v. Railway Co.*, 35 W. Va. 391.

h. Harmless modification of proper instructions.

Although an instruction propounds the law correctly, and the court modifies it, the judgment will not be reversed for that reason, unless the modification was to the prejudice of the exceptor. *Tompkins v. Board*, 21 W. Va. 224.

10. SUBMITTING QUESTIONS OF LAW ONLY.

- a. Submitting questions of law to juries prohibited.
- b. Duty of trial courts when the law is plainly for one of the parties.

a. Submitting questions of law to juries prohibited.

An instruction must not submit a question of law to the jury. *Tracewell v. County Court*, 58 W. Va. —.

b. Duty of trial court when the law is plainly for one of the parties.

When the law as applied to the facts in evidence is plainly for one of the parties the court should instruct the jury to return a verdict accordingly. *Porter v. Mack*, 50 W. Va. 583.

11. ASSUMPTION OF FACTS.

- a. Instructions must be based upon facts proven.
- b. Correct assumption of facts.
- c. Facts proven beyond controversy.

- d. Facts admitted, or sustained by the evidence.
- e. State of facts unsupported by evidence.
- f. Important and material facts not conceded as true.
- g. State of facts other than exist in case.
- h. Facts not proven—Weight of evidence.
- i. Intimation of opinion of court as to facts.

a. Instructions must be based upon facts proven.

Instructions which are not based upon, or applicable to the facts proven in the case, should not be given to the jury, although they may be correct as abstract principles of law. *Coffman v. Hedrick*, 32 W. Va. 120.

b. Correct assumption of facts.

Where there is an assumption of a fact in an instruction given to the jury, and the evidence which is certified as to the correctness of the assumption is so full and uncontradicted as to necessitate the inference that it was undisputed or tacitly admitted, the judgment will not be reversed because the fact was so assumed to be true. *Sheff v. City of Huntington*, 16 W. Va. 307.

c. Facts proven beyond controversy.

An instruction ought never to assume as proven the facts which it supposes, but ought to be hypothetical; yet, if such an instruction has been given, and the appellate court sees from the record that those facts were proven beyond controversy, and were conceded or tacitly conceded, and not a subject of controversy on the trial, such improper instruction will not be ground for reversal, if correct in law. *Carrico v. Railway Co.*, 39 W. Va. 87.

d. Facts admitted, or sustained by the evidence.

A judgment will be reversed where the court below, in an instruction excepted to, has assumed a material fact, unless the record shows affirmatively that the fact so assumed was admitted expressly or tacitly, or that it was so fully sustained by uncontradicted evidence as to necessitate the inference that it was an undisputed fact. *State v. Lowe*, 21 W. Va. 782.

e. State of facts unsupported by evidence.

An instruction based upon a state of facts wholly unsupported by the evidence adduced upon the trial is properly rejected, although it may correctly propound the law upon the assumed statement of facts. *State v. Poindexter*, 23 W. Va. 806.

f. Important and material facts not conceded as true.

An instruction which assumes an important and material fact as true, which is not conceded in the case, and which the evidence does not tend to prove, should not be given to the jury. *State v. Dickey*, 46 W. Va. 319.

g. State of facts other than exist in case.

If the evidence tends to prove one state of facts, and the instruction prayed supposes and is predicated upon an opposite state of facts, the existence of which there is no evidence tending to prove, it is not generally error for the court to refuse the instruction. *Moore v. Douglass*, 14 W. Va. 708.

h. Facts not proven—Weight of evidence.

An instruction should not assume a fact as not proven when there is any evidence tending in an appreciable,

though slight degree, to establish it. An instruction should not pass on the weight of evidence. *Bently v. Insurance Co.*, 40 W. Va. 730.

i. Intimations of opinions of the court as to facts.

Where an instruction assumes certain things as facts, and is in such shape as to intimate to the jury what the judge believes the evidence to be touching such facts it is error to give such instruction, although it may propound the law correctly. *State v. Allen*, 45 W. Va. 46.

12. MIXED QUESTIONS OF LAW AND FACT.

a. Whether questions of law or fact.

b. Same—Material allegations.

c. Separating the facts from the law.

a. Whether questions of law or fact.

Where there is no controversy as to the facts or inferences that may be fairly drawn from them, the question to be determined is one of law for the court. Where such is not the case, the question is for the jury. *Thomas v. Electrical Co.*, 54 W. Va. 395.

b. Same—Material allegations.

It is not proper to instruct the jury that if they believe from the evidence that the plaintiff has proved the material allegations of his declaration they should find for the plaintiff. What is a material allegation is a question of law for the court. *Dicken v. Salt Co.*, 41 W. Va. 512.

c. Separating the facts from the law.

When in the statement of an instruction asked for, there

is such a mixture of facts with the law, which necessarily would demand the opinion of the court on both, so as to necessitate the court to either refuse the instruction, or to discriminate between the facts and the law, which it is not bound to, it is not error to refuse the instruction. *Patton v. Navigation Co.*, 13 W. Va. 261.

13. ABSTRACT QUESTIONS.

- a. Courts not required to instruct as to.
- b. Action of appellate court as to erroneous instruction on.

a. Courts not required to instruct as to.

The court is not bound to give an instruction upon a mere abstract question, and if it does so, under circumstances calculated to mislead the jury, such instruction will be error, for which the judgment will be reversed. *State v. Allen*, 45 W. Va. 75.

b. Action of appellate court as to erroneous instructions on.

If an instruction given by a court on an abstract question is erroneous, the appellate court will not reverse the judgment of the court below on that account, if it appears that no injury could have resulted to the plaintiff in error from such erroneous instruction; but if such erroneous instruction was calculated to mislead the jury to the injury of the plaintiff in error, the appellate court will reverse the judgment, and award a new trial on that account. *Sheppard v. Insurance Co.*, 21 W. Va. 370.

14. ABSTRACT OR ERRONEOUS PROPOSITIONS OF LAW.

- a. Misleading instructions on.

- b. Law quoted from text books.
- c. Asserting erroneous propositions.
- d. Failure to connect abstract propositions with the evidence.

a. Misleading instructions.

It is error to give an abstract proposition, as an instruction to a jury, which is calculated to mislead them. *Claiborne v. Railway Co.*, 46 W. Va. 363.

b. Law quoted from text books.

It is not improper for the court to refuse to give to the jury, as an instruction at the request of the accused, abstract propositions of law, quoted from a text book, and not indicating to what class of evidence in the case it is applicable. *State v. Prater*, 52 W. Va. 133.

c. Asserting erroneous propositions.

Where an instruction asserts a proposition apparently erroneous, and is given, and excepted to, the judgment should be reversed, though it is not shown, whether in fact, the instruction prejudiced the appellant or not. *Dingess v. Branson*, 14 W. Va. 100.

d. Failure to connect abstract propositions with the evidence.

An instruction embodying an abstract proposition of law, without in any way connecting it with the evidence or indicating what facts the jury must find from the evidence, in order to make it applicable to the case, ought not to be given; and if the court can see that such an instruction has confused or mislead the jury, the judgment resulting from the verdict will be reversed. *Parker v. Building Association*, 55 W. Va. 134.

15. HYPOTHETICAL INSTRUCTIONS.

- a. Failure of evidence to establish facts.
- b. Omission of material facts.
- c. Omission of reference to facts.

a. **Failure of evidence to establish facts.**

It is error to instruct the jury hypothetically, upon a state of facts where there is no evidence in the case tending to prove such facts. *Oliver v. Railroad Co.*, 42 W. Va. 703.

b. **Omission of material facts.**

When the court instructs the jury that if they believe from the evidence certain hypothetical facts mentioned in the instructions, they must find for the party, plaintiff or defendant, as the case may be, but omits from such statement of facts a material fact, which being believed from the evidence would require a different verdict, such instruction is erroneous, and if excepted to and not cured, is ground for reversal. *Woodell v. Improvement Co.*, 38 W. Va. 23.

c. **Omission of reference to facts.**

A hypothetical instruction directing a finding in favor of a party which omits any reference to the facts is erroneous, nor can such error be cured by other instructions given on behalf of either party. *McVey v. St. Clair Co.*, 49 W. Va. 412.

16. VAGUE OR OBSCURE INSTRUCTIONS.

- a. Doubt as to meaning intended.

- b. Instructions susceptible of two constructions.
- c. Same—Rule of appellate court as to.
- d. Propositions at variance with the law applicable to the evidence.
- e. Inconsistent legal propositions.

a. Doubt as to meaning intended.

When an instruction asked for is so imperfectly expressed that its true meaning is not discernible, and would tend to mislead the jury, it should be refused. *Patton v. Navigation Co.*, 13 W. Va. 261.

b. Instructions susceptible of two constructions.

An instruction which is susceptible of two constructions, one of which is erroneous and may mislead the jury, should not be given. *Gas Co. v. Wheeling*, 8 W. Va. 323.

c. Same—Rule of appellate court as to.

Where, on critical examination, an instruction is susceptible of more than one construction or meaning, this court will adopt that which, in the exercise of ordinary good sense, was evidently given to it by the trial-court and jury. *Bank v. Napier*, 41 W. Va. 481.

d. Propositions at variance with the law applicable to the evidence.

The giving of an instruction which, by reason of its susceptibility of such interpretations as will make it express a proposition at variance with the law applicable to the evidence which forms its subject matter, is erroneous and prejudicial, although another interpretation of it in harmony with the law is not precluded by its terms. *Harmon v. Maddy Bros.*, 57 W. Va. 66.

e. Inconsistent legal propositions.

Instructions must not be obscure, or vague and indefinite, or put inconsistent legal propositions, or propositions which no evidence fairly presents, or be inconsistent with others in the case, or present a certain hypothesis and make the case turn wholly on it, disregarding another hypothesis fairly arising on the evidence. *Industrial Co. v. Schultz*, 43 W. Va. 471.

17. CONFUSING OR MISLEADING INSTRUCTIONS.

- a. Doubt as to meaning intended.
- b. Unintelligible instructions.
- c. Misleading instructions.
- d. Instructions not justified by the evidence.
- e. Instructions not fully stating the law.
- f. Conflicting instructions.
- g. Necessity for evidence tending to prove the case.
- h. Instructions containing paragraphs from books.
- i. Instructions raising immaterial or irrelevant issues.

a. Doubt as to meaning intended.

An instruction which is confused in its language and makes it doubtful what is intended thereby, and is calculated to mislead the jury, should not be given. *State v. Cain*, 20 W. Va. 681.

b. Unintelligible instructions.

An instruction which is confused in its language, contradictory in its terms and unintelligible, is calculated to mislead the jury and should not be given. *State v. Robinson*, 20 W. Va. 714.

c. Misleading instructions.

It is not error to refuse a misleading instruction. *Stewart v. Doak*, 58 W. Va. —.

d. Instructions not justified by the evidence.

Instructions not justified by the evidence and tending to mislead the jury should not be given. *State v. Manns*, 48 W. Va. 480.

e. Instructions not fully stating the law.

Instructions which do not fully state the law on a given point are erroneous and should not be given, as they tend to mislead the jury. *State v. Manns*, 48 W. Va. 480.

f. Conflicting instructions.

Conflicting instructions which are calculated to confuse and mislead the jury should not be given. *Reese v. Railroad Co.*, 42 W. Va. 333.

g. Necessity for evidence tending to prove the case.

An instruction prayed should be pertinent, and there should generally be evidence in the case tending to prove the case the instruction supposes to exist, otherwise the instruction should be rejected as tending to confuse and mislead the jury, as well as for not being pertinent. *Moore v. Douglass*, 14 W. Va. 708.

h. Instructions containing paragraphs from books.

The court should not give as an instruction a paragraph from a book containing matters hard to be understood and calculated to confuse and mislead. *Nicholas v. Kershner*, 20 W. Va. 252.

i. Instructions raising immaterial or irrelevant issues.

It is not error to refuse instructions the giving of which would raise immaterial or irrelevant issues and thereby tend to mislead and confuse the jury. *State v. Clark*. 51 W. Va. 458.

18. INCONSISTENT OR CONTRADICTORY INSTRUCTIONS.

- a. Inconsistent instructions—Reasons for refusal of.
- b. Same—Failure of good instructions to cure bad instructions.
- c. Contradictory instructions — Reversal because of.
- d. Conflicting theories.

a. Inconsistent instructions—Reasons for refusal of.

It is error to give inconsistent instructions to the jury, for it is calculated to confuse and mislead them; it leaves the jury at liberty to decide according to the correct rule of law or the contrary, and renders it impossible for the court to determine upon what legal principle the verdict was founded. *McMechen v. McMechen*, 17 W. Va. 684.

b. Same—Failure of good instructions to cure bad instructions.

Instructions must not be inconsistent with each other. A bad instruction is not cured by a good one, though they be given on the motion of adverse litigants. *Ward v. Ward*, 47 W. Va. 766.

c. Contradictory instructions—Reversal because of.

Where instructions given in behalf of one party are er-

roneous, and contradictory to instructions given in behalf of the other party, judgment in favor of the party for whom the erroneous instructions were given, will be reversed. *Barnett v. Lumber Co.*, 43 W. Va. 441.

d. Conflicting theories.

An instruction stating the law applicable to one theory of the case, and substantially covering all the facts upon which the correctness of such theory depends, is proper, if there is any evidence in the case, tending to prove such facts, although it ignores other facts put in issue as part of another and different theory which, if true, leads to a different conclusion and result, when another instruction has been given in the case, covering such conflicting theory. *Rhoades v. Railway Co.*, 49 W. Va. 495.

19. CONJECTURAL INSTRUCTIONS.

a. Evidence tending to prove certain facts.

It is error to instruct the jury upon a conjectural state of facts, upon which no evidence has been offered; but if the evidence in the case tends to prove certain facts, it is proper to give instructions to the jury based thereon. *McMechen v. McMechen*, 17 W. Va. 685.

20. SPECIFIC INSTRUCTIONS.

a. Necessity for asking and giving.

A court, though asked, is not bound to instruct a jury generally as to the law of the case. Instructions as to the specific law points ought to be asked. A court may, without request, if it thinks the interests of justice and a fair trial call for it, instruct the jury in matters of law, the

instruction being sound in law and relevant to the evidence; but it is not bound to do so unless asked; but if asked to give such proper specific instructions, it must do so. *State v. Cobbs*, 40 W. Va 718.

21. SUPPOSITIVE INSTRUCTIONS.

- a. Evidence tending to prove case supposed.
- b. Weak evidence.

a. Evidence tending to prove case supposed.

If there is any evidence before the jury tending to prove a case supposed in an instruction asked for, and the instruction propounds the law correctly, it should be given. *State v. Betsall*, 11 W. Va. 729.

b. Weak evidence.

If an instruction has been given, this court will not reverse a judgment because of it, if there is any evidence tending to prove the fact it supposes, though, in the opinion of the court, the evidence be very weak. *Carrico v. Railway Co.*, 39 W. Va. 87.

22. NUMEROUS INSTRUCTIONS—REPEATING INSTRUCTIONS.

- a. Refusal of instructions when others given on same point.
- b. Repeating instructions.
- c. Instructions to same legal effect as others given.
- d. Same—Clearly laying down the law.
- e. Phases of case not presented in other instructions

f. Enquiry as to a particular matter.

g. Correcting a faulty instruction.

a. Refusal of instructions when others are given on same point.

A court need not—ought not to—give innumerable instructions. They produce confusion of mind in the jury. Even expert lawyers and judges are scarcely able to discriminate between numerous instructions, when properly given. Good cases are often lost in both the circuit and appellate courts by instructions better out of them. When instructions given, no matter on which side, fairly and clearly lay down the law of the case, it is not error to refuse others on the same point, though good. An instruction need not be repeated, if substantially already given. *State v. Bingham*, 42 W. Va. 239.

b. Repeating instructions.

Where instructions given clearly and fairly lay down the law of the case, it is not error to refuse other instructions on the same subject. The court need not repeat instructions already substantially given. *State v. Bingham*, 42 W. Va. 234.

c. Instructions to same legal effect as others given.

The trial court, in its sound discretion, may refuse to give numerous instructions which are to the same legal effect, and only vary as to the position of the words, clauses and sentences used in their construction. It may also decline to give numerous instructions as to facts virtually taken from the consideration of the jury by other instructions given. *Davidson v. Railway Co.*, 41 W. Va. 408.

d. Same—Clearly laying down the law.

It is again held that where instructions clearly and fairly lay down the law upon a subject, it is not error to refuse others to the same effect. The court need not repeat instructions already substantially given. *State v. Cottrill*, 52 W. Va. 363.

e. Phases of case not presented in other instructions.

Instructions asked by the accused which properly propound the law, are justified by the evidence, and present to the jury a phase of the case not presented in other instructions, should be given, and it is reversible error to refuse them. *State v. Kerns*, 47 W. Va. 266.

f. Enquiry as to a particular matter.

While two special questions covering the same enquiry should not be put to a jury, yet if one covering some matter of another is so drawn as to more definitely and pointedly enquire as to a particular matter controlling the case, it should be given. *Veith v. Salt Co.*, 51 W. Va. 96.

g. Correcting a faulty instruction.

It is not error to refuse to correct a faulty instruction, or to refuse to give the same instruction twice. *Shrewsbury v. Tufts*, 41 W. Va. 213.

23. REFUSAL OF PROPER INSTRUCTIONS.

- a. Effect of refusal on the verdict.
- b. Giving other instructions to same effect.
- c. Oral instructions—Refusal of correct written instructions.

a. Effect of refusal on the verdict.

When a correct instruction is refused, the verdict will

be set aside, unless the appellate court can see from the record that, even under the instruction, a different verdict could not rightly have been found. *Ward v. Brown*, 53 W. Va. 230.

b. Giving other instructions to same effect.

Though proper instructions may be refused, yet if other instructions are given covering the same questions and to the same effect such refusal is not reversible error. *Arthur v. City of Charleston*, 51 W. Va. 132.

c. Oral instructions—Refusal of correct written instructions.

The refusal of a correct written instruction will not call for a new trial when the court gives an oral one in lieu of it on the same subject, and it does not appear what the oral instruction was in detail, and there was no objection or exception to its matter.

The better practice is to require instructions to be in writing; but the mere fact that an instruction is oral will not reverse. *State v. Woodrow*, 58 W. Va. —.

24. GIVING IMPROPER AND REFUSING PROPER INSTRUCTIONS.

- a. When reversal not had because of.
- b. Different hypotheses.
- c. Instructions presenting defense.
- d. Instructions not warranted by the evidence.
- e. Preponderance of evidence—Harmless error.
- f. Failure to correct improper instructions.

a. When reversal not had because of.

If improper instructions are given, or proper ones are

refused on the trial, the judgment will be reversed, unless the evidence is so plainly and decidedly in favor of the finding of the jury that the giving or refusal of such instructions amount to merely harmless error. *McVey v. St. Clair Co.*, 49 W. Va. 412.

b. Different hypotheses.

The giving of instructions predicated upon two different hypotheses, in support of one of which there is no evidence, and the refusal of a proper instruction embodying the one theory which the evidence tends to establish, is prejudicial error, calling for a new trial. *State v. Pine*, 56 W. Va. 1.

c. Instructions presenting defense.

Instructions asked by the accused presenting his defense, and which the evidence, in any degree, tends to support, should be given. *State v. Manns*, 48 W. Va. 480.

d. Instructions not warranted by the evidence.

It is error for the trial court to give instructions which are not warranted by the evidence. *State v. Cross*, 42 W. Va. 253.

e. Preponderance of evidence—Harmless error.

On consideration of the whole evidence, as required by legislative enactment, if it appear that the verdict of the jury is sustained by a decided preponderance thereof, this court will not set aside such verdict and grant a new trial because the trial court may have given improper or refused proper instructions, not interfering with or affecting the preponderance of evidence, for such erroneous rulings must be deemed to be harmless error. *Bank v. Napier*, 41 W. Va. 481.

f. Failure to correct improper instructions.

As a general rule failure by the trial-court to correct and give as corrected, an improper instruction asked, is not error. *State v. Caddle*, 35 W. Va. 73.

25. PRESUMPTIONS AS TO ERRONEOUS INSTRUCTIONS.

- a. When presumptions overcome.
- b. Same—Harmless instructions.

a. When presumptions overcome.

Where an erroneous instruction has been given to the jury, the presumption is that the exceptor has been prejudiced thereby, and the judgment will be reversed for such cause, unless it clearly appears from the record, that the exceptor could not have been so prejudiced. *State v. Douglass*, 28 W. Va. 298.

b. Same—Harmless instructions.

An erroneous instruction on a material point is presumed to be to the prejudice of the party against whom it is given, and will cause reversal, unless it clearly appears from the record that it was harmless. *Osborne & Co. v. Francis*, 38 W. Va. 312.

26. DISREGARDING INSTRUCTIONS.

- a. Necessity for following instructions.
- b. Law applicable to facts.
- c. Erroneous instructions.

a. Necessity for following instructions.

The jury is not the judge of the law, contrary to the instructions of the court, but must follow the instruc-

tions of the court upon the law. *State v. Dickey*, 48 W. Va. 325.

b. Law applicable to facts.

Where instructions given by the court properly propound the law applicable to the facts proven, the jury cannot disregard such instructions; and if they do so, their verdict will be set aside. *Fisher v. Railroad Co.*, 42 W. Va. 183.

c. Erroneous instructions.

A new trial will not be allowed because the jury disregarded an instruction erroneous in law. *Watts v. Railroad Co.*, 39 W. Va. 198.

27. AFFIDAVITS OF JURORS AS TO UNDERSTANDING INSTRUCTIONS.

a. When such affidavit not to be read.

The affidavit of jurors as to how they understood the instructions of the court, and that in accordance with such understanding the verdict was rendered, will not be read on a motion to set verdict aside. *Reynolds v. Tompkins*, 23 W. Va. 229.

28. HARMLESS INSTRUCTIONS.

- a. When harmlessness apparent.
- b. Same—Presumption as to.
- c. Necessity for apparent harmlessness—Incorrect or abstract instructions.
- d. Same—Giving or refusing instructions.
- e. When a different verdict could not have been rightly found.

- f. Misinstructing the jury—Facts shown in the record.
- g. Matter not within the province of the jury.
- h. Sufficient evidence to support the hypothesis of instructions.
- i. Giving undue importance to the evidence.

a. When harmlessness apparent.

When the court can clearly see affirmatively that the error has worked no harm to the party appealing, it will be disregarded. *Osborne & Co. v. Francis*, 38 W. Va. 322.

b. Same—Presumption as to.

An erroneous instruction on a material point is presumed to the prejudice of the party appealing against whom it is given, and will cause reversal, unless it clearly appears from the record that it was harmless. *Ward v. Ward*, 47 W. Va. 766.

c. Necessity for apparent harmlessness—Incorrect or abstract instructions.

An instruction which could not possibly have prejudiced the party, though incorrect or abstract, will not be ground for reversal; but it must be very clear that it could not have hurt the party complaining of it. *Carrico v. Railway Co.*, 39 W. Va. 88.

d. Same—Giving or refusing instructions.

Error in giving or refusing to give certain instructions affords no ground for reversing a judgment, when it is evident that the party complaining could not have been injured thereby. *Hannum v. Hill*, 52 W. Va. 166.

e. When a different verdict could not have been rightly found.

Whenever a correct instruction is refused, the judgment will be reversed, unless the appellate court can see from the whole record that, even under correct instructions, a different verdict could not have been rightly found, or unless it is able to perceive that the erroneous ruling of the court could not have influenced the jury. *Davis v. Webb*, 46 W. Va. 6.

f. Misinstructing the jury—Facts shown in the record.

The court will not reverse a judgment merely because the trial court misinstructed the jury, when all the facts in the case are in the record, and it appears thereby that the plaintiff in error could not have been injured by the misinstruction. *Corder v. Talbott*, 14 W. Va. 284.

g. Matter not within the province of the jury.

Where it is proper that the court, and not the jury, should pass upon a matter and find thereon, but a jury finds upon it, and the court renders judgment, if the judgment is the same that the court should have rendered if it had expressly found on such matter, this error is harmless, and not cause for reversal. *Miller v. White*, 46 W. Va. 68.

h. Sufficient evidence to support hypothesis of instructions.

Where there is sufficient evidence to support the hypothesis of an instruction, and it correctly propounds the law, and is otherwise unobjectionable, it is error to refuse it; but if this court sees plainly from the record that the party offering the instruction has not been in-

jured by its rejection, the verdict of the jury will not be disturbed on account of the court's refusal to grant it. *Bridge Co. v. Bridge Co.*, 34 W. Va. 155.

i. Giving undue importance to the evidence.

An instruction given at the request of a party and covering only a part of the theory to which it relates, and tending to prove which there is evidence in the case, is open to criticism because of its narrowness, but if no general instruction, stating the law upon the theory is given in the case, and the instruction is not in such terms as to give undue importance referred to in it, and it is manifest that the giving of such instruction has not operated to the prejudice of the party complaining, the judgment will not be reversed on account thereof. *Maxwell v. Kent*, 49 W. Va. 543.

29. LOST INSTRUCTIONS.

a. Presumptions as to.

An instruction lost, and not appearing in the record, will be presumed to be correct, and no error can be assigned to it. *Jordan v. Benwood*, 42 W. Va. 313.

30. WITNESSES—COMPETENCY OF—IN GENERAL.

- a. By whom competency of witnesses determined.
- b. Wife not a competent witness against her husband in a prosecution for crime.
- c. As to one convicted of felony—Exceptions as to perjury.

a. By whom competency of witnesses determined.

The question of the competency of a witness is a ques-

tion for the court and not for the jury; and when a witness is offered, and a doubt is raised as to the competency of such witness, it is the duty of the court to determine that question upon a careful examination of the witness. If on the examination of such witness his incompetency appears, it is the duty of the court, on motion of the party whose interests are affected by the testimony of such witness, to exclude his evidence from the jury; and it would be error for the court to refer the question of competency to the jury, either by instruction or otherwise. *State v. Michael*, 37 W. Va. 565.

b. Wife not a competent witness against her husband in a prosecution for crime.

A wife is not a competent witness against her husband in a prosecution for crime.

Quære? Is a wife or husband a competent witness now against each other, in a prosecution for crime committed against such witness? *State v. Woodrow*, 58 W. Va. —.

c. As to one convicted of felony—Exceptions as to perjury.

A person convicted of felony and sentenced therefor, except it be for perjury, may, by leave of the court, be examined as a witness in any criminal prosecution, though he has not been pardoned or punished therefor. *State v. Hatfield*, 48 W. Va. 562.

31. MISTAKE IN NOT SWEARING WITNESSES.

- a. Discovery of mistake before the jury retires.
- b. Same—After verdict is rendered.

a. Discovery of mistake before the jury retires.

If a mistake in not swearing a witness is discovered before the jury retires, it may be corrected either by swearing the witness and rehearing his evidence, or by instructing the jury to disregard his evidence. *State v. Williams*, 49 W. Va. 220.

b. Same—After verdict is rendered.

If, after verdict, it is shown to the court, upon a motion for a new trial, that a witness had testified without having been sworn, and that neither the party affected, nor his counsel, had knowledge of such irregularity until after the verdict was rendered, a new trial must be allowed, although the error was purely inadvertent and accidental. *State v. Taylor*, 57 W. Va. 228.

32. CLASSIFICATION OF WITNESSES.

a. Opportunities for witnesses to know the truth.

It is error to classify witnesses in respect to the weight and value of their evidence by an instruction to the jury, unless the classification is based upon a well defined distinction as to the opportunities and powers of the witnesses to know the truth. *Ward v. Brown*, 53 W. Va. 228.

33. SINGLING OUT WITNESSES.

a. Naming witness whose testimony is applicable.

b. Same—When instruction proper in other respects.

a. Naming witness whose testimony is applicable.

It is improper to single out one witness, and instruct

the jury that his evidence is entitled to great weight. *Kerr v. Lunsford*, 31 W. Va. 662.

b. Same—When instruction proper in other respects.

If an instruction is proper in other respects, it is not vitiated by merely naming the witness to whose testimony it is applicable. *Ward v. Brown*, 53 W. Va. 229.

34. IMPEACHMENT OF WITNESSES.

a. Arbitrary disregard of evidence.

It is not error for the court, after correctly instructing the jury as to how witnesses may be impeached, to say to the jury that "it is neglect of a juror's duty to arbitrarily disregard the evidence of a witness." *State v. Sutfin*, 22 W. Va. 772.

35. DISREGARDING TESTIMONY OF WITNESSES.

a. Providence of court as to.

b. Province of jury as to.

c. Same—As to weight of evidence.

a. Province of court as to.

It is not the province of the court to instruct the jury in regard to the testimony of any witness, that they shall or shall not believe all or none, or any part of the evidence given by such witness. *State v. Allen*, 45 W. Va. 77.

b. Province of jury as to.

It is error for the court to refuse to instruct the jury that if they believe the testimony of a witness on any material point is untrue, they are at liberty to disregard his whole testimony. *State v. Perry*, 41 W. Va. 642.

c. Same—As to weight of evidence.

An instruction which tells the jury that if they believe any witness has testified falsely in the case, as to material matters, they may disregard such false testimony or give to it and all the evidence of such witness such weight as they believe it entitled to, is improper in failing to inform the jury that they may disregard all the evidence of such witness. *Ward v. Brown*, 53 W. Va. 229.

36. EXISTENCE OF FACTS.

- a. Facts proven.
- b. Facts constituting defense.
- c. Absence of evidence.
- d. Law applicable to facts.
- e. Doubtful material facts.

a. Facts proven.

It is not reversible error to refuse to instruct the jury that they should consider facts, established by the evidence, in arriving at their verdict. *State v. Prater*, 52 W. Va. 134.

b. Facts constituting defense.

If the facts on either side have been proven before the jury, the court, at the trial, may instruct the jury that such facts constitute no defense for the defendant and no grounds of claim by the plaintiff. *Cappellar v. Insurance Co.*, 21 W. Va. 577.

c. Absence of evidence.

Where the plaintiff, in an action at law, fails to introduce any evidence at all to prove a fact essential to his recovery, it is error for the court to give an instruction

which submits to the jury the question of the existence of such fact. *Parker v. Building Asso.*, 55 W. Va. 134.

d. Law applicable to facts.

It is competent for the court to instruct the jury that if from the evidence before them, they believe certain facts are proved, that then certain legal consequences must follow, and that the law as applicable to the facts so established is for the plaintiff or defendant, and they must find accordingly. *Skeels v. Railroad Co.*, 3 W. Va. 556.

e. Doubtful material facts.

If the material facts are doubtful and a verdict for either party would be sustained, the court should not instruct the jury to find against such party. *White v. Brewing Co.*, 51 W. Va. 259.

37. SINGLING OUT FACTS.

- a. Ignoring material facts.
- b. Giving undue prominence to certain facts.
- c. Existence of other facts.
- d. Ignoring other facts proven.
- e. Same—Material facts or elements.
- f. Making specific facts bases of instructions.

a. Ignoring material facts.

An instruction which singles out certain facts and makes the case turn on them, ignoring other material facts in the case, is erroneous. *Robinson v. Lowe*, 50 W. Va. 75.

b. Giving undue prominence to certain facts.

An instruction which singles out and gives undue prom-

inence to certain facts, ignoring other facts, proved, and of equal importance in a proper determination of the case, is improper. *State v. Dodds*, 54 W. Va. 290.

c. Existence of other facts.

It is error for the court, in giving instructions to the jury, to single out certain facts and instruct them that, if they are true, they must find for either party in accordance with such facts, when there are other facts in the case bearing on the subject tending to establish a different conclusion. *Storrs v. Feick*, 24 W. Va. 606.

d. Ignoring other facts proven.

An instruction which sets forth the evidence as to part of the facts in issue, and ignores certain other facts proven, and on the former directs a verdict in favor of the party in whose favor it was given, is erroneous. *Claiborne v. Railway Co.*, 46 W. Va. 363.

e. Same—Material facts or elements.

An instruction should not single out one fact, or element of the case and make the case turn entirely on it, by telling the jury to find according to the hypothesis of that fact or element, ignoring all other material facts or elements. *State v. Morgan*, 35 W. Va. 261.

f. Making specific facts basis of instructions.

It is not proper for the court to separate a few facts from their connection with others, and make them the basis of an instruction. Such a course would tend to mislead the jury. *Washington v. Railroad Co.*, 17 W. Va. 215.

38. COMPETENCY OF EVIDENCE.

a. **How competency determined—Preliminary facts.**

When a question occurs before a court of law whether certain evidence is competent, the determination of which depends upon certain preliminary facts, those facts must be decided by the court. *Snooks v. Wingfield*, 52 W. Va. 442.

39. CIRCUMSTANTIAL EVIDENCE.

a. What necessary for conviction on.

b. Comparison of with other evidence.

a. **What necessary for conviction on.**

A person charged with crime may be convicted on circumstantial evidence alone, if the jury believe from such evidence, to a moral certainty and beyond a reasonable doubt, that the defendant is guilty of the crime alleged against him; and the jury may be properly so instructed, and that they have the right to convict upon such evidence in a case in which the evidence is circumstantial, if, from it, they so believe the defendant is guilty, and, further, that such evidence is not only competent, but is sometimes the only mode of proof in criminal cases. *State v. Sheppard*, 49 W. Va. 585.

b. **Comparison of with other evidence.**

In a case where the evidence is entirely circumstantial, it is error in the court to instruct the jury that circumstantial evidence is often more reliable than the direct testimony of eye-witnesses, and that a verdict of guilty in such cases may rest on a surer basis than when rendered upon the testimony of eye-witnesses where memory must

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be relied upon, and where passions and prejudices may have influenced them, for the reason that it institutes a comparison between the two kinds of evidence mentioned, and instructs the jury as to the comparative weight of circumstantial evidence. *State v. Musgrave*, 43 W. Va. 672.

40. WEIGHT AND PREPONDERANCE OF EVIDENCE.

- a. Weight of evidence—Instructions as to, prohibited.
- b. Same—How determined.
- c. Same—Expert evidence—Connection with other evidence.
- d. Same—Interest of parties in the result of the verdict.
- e. Preponderance of evidence—Doubtful material facts.

a. **Weight of evidence—Instructions as to, prohibited.**

It is manifestly improper to instruct the jury as to the weight of evidence. *State v. Greer*, 22 W. Va. 801.

b. **Same—How determined.**

The weight to be accorded to evidence is matter for determination by the jury, and an instruction which wholly or partially withdraws it from their control, by limiting or defining it, is generally cause for error. *Harmon v. Maddy Bros.*, 57 W. Va. 66.

c. **Same — Expert evidence — Connection with other evidence.**

Expert testimony, except under special circumstances, is entitled to only such weight as the jury may deem it

entitled to when viewed in connection with all the evidence and circumstances. *Ward v. Brown*, 53 W. Va. 228.

d. Same—Interest of parties in the result of the verdict.

The court properly refuses an instruction to the effect that the jury, in passing upon the testimony of a party, may take into consideration his situation and interest in the result of the verdict and all the circumstances surrounding him, and give it only such weight as they may deem it fairly entitled to, when a witness against him is deeply interested in a moral sense, and no such direction as to his testimony is included. *Tompkins v. Insurance Co.*, 53 W. Va. 479.

e. Preponderance of evidence—Doubtful material facts.

The circuit court commits no reversible error in instructing a jury to find for a party in whose favor the evidence plainly and decidedly preponderates. If the material facts are doubtful and a verdict for either party would be sustained, the circuit court should not instruct the jury to find against such party. *White v. Brewing Co.*, 51 W. Va. 259.

41. CONFLICTING OR CONTRADICTORY EVIDENCE.

- a. Specifying weight or value of testimony.
- b. Law applicable to different theories.
- c. Facts supposed—Preponderance of evidence.

a. Specifying weight and value of testimony.

The giving of erroneous instructions bearing upon the weight and value of certain testimony, when the evidence

is contradictory, is cause for reversal. *Ward v. Brown*, 53 W. Va. 230.

b. Law applicable to different theories.

When there is conflict of testimony, and evidence on one side supporting one theory, and evidence on the other side supporting another and conflicting theory, and the principles of law applicable to each theory are different, it is error for the court to give as instructions to the jury abstract propositions of law which are applicable to only one of said theories, without any reference in such instructions to the evidence in the case. *Webb v. Packet Co.*, 43 W. Va. 800.

c. Facts supposed—Preponderance of evidence.

Where there is conflicting evidence as to the facts supposed the question is one for the jury and their verdict should not be disturbed unless it is clearly contrary to a decided preponderance of the evidence. *Foley v. City of Huntington*, 51 W. Va. 396.

42. COLORABLE EVIDENCE.

a. Sound legal proposition—Slight evidence.

It is not error to refuse an instruction which puts a legal proposition, though sound, if the evidence to present it as pertinent to the case is slight, and only colorable, and does not fairly present it for consideration, and where a verdict finding according to the instruction would be set aside as without sufficient evidence. *McDonald v. Cole*, 46 W. Va. 186.

43. UNCORROBORATED EVIDENCE.

a. Duty of jury to scrutinize.

b. Prohibiting instructions as to weight of—Accomplices.

c. Testimony of accomplices—Action of appellate court as to.

a. **Duty of jury to scrutinize.**

It is error for the court to refuse to instruct the jury that it is their duty to scrutinize, with care and caution, the uncorroborated and contradicted testimony of witnesses.—*State v. Perry*, 41 W. Va. 641.

b. **Prohibiting instructions as to weight of—Accomplices.**

While the uncorroborated testimony of an accomplice is suspicious, and emanates from a bad source, yet the jury, may believe it, although it is wholly uncorroborated; and in this state it is not proper for the court to give any instructions to the jury as to the weight of such, or any other evidence. *State v. Betsall*, 11 W. Va. 703.

c. **Testimony of accomplices—Action of appellate court as to.**

A conviction may be had on the uncorroborated testimony of an accomplice, and in such case, if the judge who presided at the trial is satisfied with the verdict and refuses to set aside, the appellate court will not reverse the judgment and set aside the verdict on the ground that it rested solely on the uncorroborated testimony of an accomplice. *State v. Betsall*, 11 W. Va. 704.

44. ISOLATED PORTIONS OF EVIDENCE.

a. **Giving undue prominence to.**

It is not error to refuse to give an instruction that gives

undue prominence to isolated portions of the evidence, and therefore calculated to mislead the jury. *State v. Morrison*, 49 W. Va. 211.

45. INADMISSIBLE OR ILLEGAL EVIDENCE.

- a. When party cannot complain of.
- b. Failure to follow with other evidence.

a. When party cannot complain of.

Upon a writ of error to an order of the circuit court setting aside the verdict of a jury and awarding a new trial, the plaintiff in error can not, for the purpose of having such order reversed, complain in this court that the trial-court admitted illegal evidence, or gave the jury improper instructions. *Ruffner v. Hill*, 31 W. Va. 428.

b. Failure to follow with other evidence.

If a party introduce evidence, not admissible by itself, and fail to follow it with other evidence, to make it admissible, it is to his own folly and loss, and not to the injury to the other party; and the court should direct the jury to disregard it. *Patton v. Navigation Co.*, 13 W. Va. 260.

46. INTIMATION OF COURT'S OPINION OF EVIDENCE.

- a. Discussion of evidence—Effect of evidence—
 Credibility of witnesses.
- b. Assuming certain things as facts.
- c. Influencing the jury.
- d. Same—Weight of evidence.
- e. As to the guilt of the accused.

a. Discussion of evidence—Effect of evidence—Credibility of witnesses.

Under our practice, the judge must not state the evidence, or discuss, or give, or intimate his opinion upon it. If anything drops from him, either casually or inadvertently, in giving instructions, or otherwise, indicating an opinion on the weight or effect of the evidence, or the credibility of a witness, it is generally ground for reversal. Cases cited in *State v. Thompson*, 21 W. Va. 756.

b. Assuming certain things as facts.

When an instruction of the court assumes certain things as facts, and is in such shape as to intimate to the jury what the judge believes the evidence to be touching such facts, it is error to give such instruction, although it may propound the law correctly. *State v. Allen*, 45 W. Va. 66.

c. Influencing the jury.

It is error for the court in the trial of a cause, to make a remark to, or in the presence of the jury, in reference to matters of fact, which might, in any degree, influence them in their verdict. *State v. Hurst*, 11 W. Va. 54.

d. Same—Weight of evidence.

The courts of this state are peculiarly jealous of any encroachment by the court on the province of the jury, and it is error for a court, in the trial of a case, to intimate any opinion in reference to matters of fact, which might, in any degree, influence the verdict, nor can the court instruct the jury as to the weight to be given by them to the evidence of any witness, whether the witness be impeached or not, or whether he is contradicted as to

material facts or not. The jury are the exclusive judges of the weight to be attached to the evidence of any witness, and the court would err in influencing them, in any way, determining this weight, either by instruction as to the proper manner in ascertaining such weight, or otherwise. *State v. Thompson*, 21 W. Va. 756.

e. As to the guilt of the accused.

Instructions given by the trial court, on its own motion, in a felony case, which may convey to the jury the opinion of the court as to the guilt of the accused are improper. *State v. Kerns*, 47 W. Va. 266.

47. ARGUMENTS OF COUNSEL.

- a. Abuse of privileges—Necessity for instructions as to.
- b. Same.
- c. Failure of opposing party to examine a material witness.

a. Abuse of privileges—Necessity for instructions as to.

In order to authorize this court to revise errors predicated upon the abuse of counsel of the privilege of argument, it should be made to appear that the party asked and was refused an instruction to the jury to disregard the unauthorized statements of the counsel. *Landers v. Railroad Co.*, 46 W. Va. 492.

b. Same.

Comment by an attorney for the state, in his argument of a felony case upon the failure of the accused, who has testified in the case, to have his wife testify and corroborate statements of his own as to matters said by him

to be known to her, is improper; and, if objected to at the time, the refusal of the court to prohibit it and direct the jury to disregard it is reversible error. *State v. Taylor*, 57 W. Va. 228.

c. Failure of opposing party to examine a material witness.

It is not improper for the trial-court to permit counsel in argument before the jury to comment on the fact that the other party has not called and examined a material witness summoned on his behalf and present, and to ask such question as may be proper to lay the foundation for such comment. But such matters are largely within the discretion of the trial-court. *Robinson v. Woodford*, 37 W. Va. 377.

48. PROBABLE CAUSE.

a. Mixed questions of law and fact—Province of courts as to.

Probable cause is a mixed question of law and fact. What are the existing facts, on which probable cause or its absence is based, is a question of fact to be decided by the jury. But the facts being admitted, undisputed or assumed, whether they constitute probable cause or not, or whether from them the existence or absence of probable cause is to be inferred, is a pure question of law for the decision of the court, and not for the jury. *Vinal v. Core*, 18 W. Va. 2.

49. EXISTENCE OF MALICE.

a. Right of courts to define malice.

Whether malice exists or not is a pure question of fact

for the jury, and should not be passed upon by the court, except to define to the jury clearly what is meant by malice. Whether particular facts admitted, undisputed or assumed, do, or do not constitute malice, or are such that malice may be inferred from, is a mere question of fact for the jury. The court can draw no inference from any state of facts that malice does or does not exist. *Vinal v. Core*, 18 W. Va. 2.

50. SELF-DEFENSE.

a. Character of assault.

An instruction is correct, which informs the jury that a party cannot shield himself under the plea of self-defense, if he had reason to believe and did believe that the assaulting party only intended to commit a trespass, and did not intend to take life or inflict great bodily harm. *State v. Greer*, 22 W. Va. 802.

51. CHARACTER OF ACCUSED—CHARACTER OF VICTIM.

a. Admissibility of evidence as to character of accused and victim.

b. Assailment of character of accused.

a. Admissibility of evidence as to character of accused and victim.

The bad character of the victim never excuses, justifies or extenuates the offense of killing, except when in connection with other facts it make out a case of self defense. The accused is never permitted to say of his victim, "I killed him because he was bad man," nor is he permitted to prove his bad character upon that theory.

Evidence of the good character of the accused is always admissible in such cases to disprove guilt, and of his pacific character to aid the jury in ascertaining the probable grade of the offense. *State v. Morrison*, 49 W. Va. 219.

b. Assailment of character of accused.

It was not error to refuse to instruct the jury that evidence of good character cannot be received in behalf of the prisoner, until his character has been assailed. *State v. Donohue*, 22 W. Va. 762.

52 DEGREES OF PUNISHMENT.

- a. Failure of evidence to establish.
- b. Whether voluntary manslaughter or homicide.
- c. Whether murder in first or second degree.

a. Failure of evidence to establish.

The refusal of an instruction, on a trial for murder, giving the findings in the power of the jury, including one of involuntary manslaughter, is not error when no evidence in the case tends to show that degree of homicide. Such instruction should not be given. *State v. Woodrow*, 58 W. Va. —.

b. Whether voluntary manslaughter or homicide.

Whether a homicide is voluntary manslaughter or homicide in self defense, is a question of fact for the jury upon the evidence. *State v. Dickey*, 48 W. Va. 325.

c. Whether murder in first or second degree.

The question whether a particular homicide is murder in the first or second degree is one of fact for the jury. *State v. Welch*, 36 W. Va. 691.

IV. EXCEPTIONS TO INSTRUCTIONS.

1. NECESSITY FOR EXCEPTIONS.
2. PURPOSE OF EXCEPTIONS—REQUISITES OF EXCEPTIONS.
3. TIME FOR OBJECTING—EXCEPTING—OFFERING—MAKING — TENDERING — SIGNING — CERTIFYING —NOTING AND RECORDING EXCEPTIONS AND BILLS OF EXCEPTION.
4. NECESSITY FOR SIGNATURES OF TRIAL-JUDGE.
5. CERTIFYING THE EVIDENCE.
6. EXCLUDING EVIDENCE.
7. WHAT ORDER-BOOK AND RECORD OF TRIAL COURT MUST SHOW—ALTERATION OF THE RECORD.
8. SETTING ASIDE THE VERDICT.

1. NECESSITY FOR EXCEPTIONS.

- a. What notice exceptor required to give—Waiving exceptions.
- b. General exceptions—When sufficient.
- c. Same.
- d. Error appearing on the record—Statute concerning defined.

- a. What notice exceptor required to give—Waiving exceptions.

If a party upon a trial before a jury objects to the giving of instructions, and after his objections are overruled and the instructions given, he does not except to the giving of the instructions, he will, in the appellate court, be deemed to have waived his objections. It is not enough that he objects, but upon the overruling of his

objection, if he would save the alleged error in the giving of the instruction, he must except and thereby give notice that he intends to have the rulings reviewed, so as to give the trial court an opportunity to re-examine the instructions and correct any error in giving such instructions. *Dimmey v. Railroad Co.*, 27 W. Va. 52.

b. General exceptions—When sufficient.

It is unnecessary that there should be separate bills of exception taken and signed to each ruling or opinion of the court excepted to, to entitle the party excepting to such opinion or ruling to have the same reviewed by an appellate court. Exceptions of a party to the opinions of the court, though they may be numerous, may be incorporated into one bill of exceptions. *Snyder v. Railroad Co.*, 11 W. Va. 14.

c. Same.

When several instructions are asked and refused, and a general exception is taken to the refusal, if all the instructions are proper and should have been given, the exception is sufficient and the judgment will be reversed. *Ocheltrec v. McClung*, 7 W. Va. 233.

d. Error appearing on the record—Statute concerning defined.

The provision of the statute that "a party may avail himself of any error appearing on the record, by which he is prejudiced, without excepting thereto," means without obtaining a formal bill of exceptions, *provided* he objects or excepts on the record to the action of the court complained of, and *provided* it is such a matter as can be considered without a *formal bill of exceptions*. *Perry v. Horn*, 22 W. Va. 381.

2. PURPOSE OF EXCEPTIONS—REQUISITES OF EXCEPTIONS.

- a. Office of bills of exceptions—What exceptor must show.
- b. In general—What bills of exception and record must show.
- c. How bills of exception must present the case.
- d. Necessity for certifying sufficient evidence to show relevancy of instructions.
- e. Same.
- f. Failure to set forth sufficient matter to show whether instructions are correct.
- g. Exceptions to part of instructions only.
- h. Exceptions raised in another bill of exceptions.
- i. Setting out sufficient grounds—Insufficient grounds.
- j. Saving points—What necessary.
- k. Waiving points—When regarded as waived.
- l. Presumption as to regularity of proceeding of trial court.

a. Office of bills of exception—What exceptor must show

The office of a bill of exception is to call the attention of the court to some specific matter as to which error is claimed, and when the acceptant relies upon the bill of exceptions he must show by means of it the error complained of clearly and affirmatively; and in order to have relief he must further show that such error was to his prejudice. *State v. Tucker*, 52 W. Va. 421.

b. In general—What bill of exceptions and record must show.

If errors, or supposed errors, are committed by a court

in its rulings during the trial of a case by a jury, the appellate court cannot review these rulings unless, first, they were objected to when made and the point saved and a bill of exceptions taken showing these rulings and unless, second, a new trial was asked of the court below and refused, and such refusal objected to in the court below, and this appears of record. If either of these essentials is omitted, the appellate court cannot review the rulings. *Danks v. Rodeheaver*, 26 W. Va. 274.

c. How bills of exception must present the case.

The bill of exception must so present the case that the appellate court may be able to determine whether the jury has correctly applied the law to the facts, in order that it may safely correct any error committed by the jury, the presumption being always in favor of the verdict; and therefore, unless the error complained of is made to appear affirmatively, it will not be disturbed. *Black v. Thomas*, 21 W. Va. 712.

d. Necessity for certifying sufficient evidence to show relevancy of instruction.

Where the court refuses an instruction to the jury, the appellate court will not reverse the judgment, unless enough of the evidence has been set out in the exception to show the relevancy and propriety of the instruction, because error must affirmatively appear; and for the same reason, if the court give the instruction, before the appellate court will reverse the judgment, the record must show the instruction wrong, or that it could not, in any aspect of the case, be properly given. *Kinsley v. County Court*, 31 W. Va. 464.

e. Same.

Error based on the giving or refusal of instructions ought to be shown by bill of exceptions giving the instructions and enough of the evidence to show whether they were proper; but where the record otherwise identifies the instruction, and shows an exception, and the whole evidence appears, that will suffice, without such bill of exceptions. *Hughes v. Frum*, 41 W. Va. 446.

f. Failure to set forth sufficient matter to show whether instructions are correct.

Where a bill of exceptions taken to the instructions of the court below does not set forth sufficient matter to show whether the instructions were correct or not, the presumption must be that they were correct. *Lively v. Ballard*, 2 W. Va. 496.

g. Exceptions to part of instructions only.

Where a number of instructions are asked for and the record states an exception to the refusal to give a part of them only, the inference is that the court gave those to which no exception was taken. *Hood v. Maxwell*, 1 W. Va. 219.

h. Exceptions raised in another bill of exceptions.

When a bill of exceptions has been taken after all the evidence has been submitted, and it purports to set out all the evidence, the evidence set out in this bill of exceptions may be looked to in considering the questions raised in another bill of exceptions taken in the progress of the trial. *Klinkler v. S. & I. Co.*, 43 W. Va. 219.

i. Setting out sufficient grounds—Insufficient grounds.

When the bill of exceptions sets out the specific grounds

on which the court set aside the verdict of the jury, this court will presume, unless the contrary appears, that it acted on those grounds alone, and if those grounds are clearly insufficient, this court will reverse the order setting aside the verdict; but generally, it takes a stronger case to reverse an order granting than it does one refusing a new trial. *Probst v. Braeunlich*, 24 W. Va. 357.

j. Savings points—What necessary.

All that should be required to save a party his point is, that it shall definitely appear on the record, the point by which he is aggrieved, and that he saved his point and did not waive it. *Perry v. Horn*, 22 W. Va. 383.

k. Waiving points—When regarded as waived.

If a party upon a trial before a jury objects to the giving of instructions, and after his objections are overruled, and the instructions are given, he does not except to the giving of the instructions, he will, in the appellate court, be deemed to have waived his objections. *Dimmey v. Railroad Co.*, 27 W. Va. 32.

l. Presumption as to regularity of proceedings of trial court.

Errors in the rulings of the court, made during the trial, and as to other matters not vital and jurisdictional in their nature, but such as may be waived, must be affirmatively shown by the record, else the proceedings are conclusively presumed to be regular. *State v. Henry*, 51 W. Va. 284.

3. TIME FOR—

OBJECTING,
EXCEPTING,

OFFERING,
MAKING,
TENDERING,
SIGNING,
CERTIFYING,
NOTING, AND
RECORDING EXCEPTIONS AND
BILLS OF EXCEPTION.

- a. When objection to instructions must be offered.
- b. When exceptions may be made.
- c. When bills of exception must be made.
- d. When bills of exception may be tendered.
- e. Time within which bills of exception must be signed.
- f. Certification of bills of exception to clerk—Duty of clerk to record.
- g. Necessity for properly certifying bills of exception.
- h. When bills of exception must be noted, certified and recorded.

a. When objection to instructions must be offered.

Where no objection is offered to an instruction before the verdict, the giving of the same cannot be ground for setting aside the verdict and granting a new trial. *Corder v. Bank*, 34 W. Va. 38.

b. When exceptions may be made.

An exception made to the opinion of the court pending a jury trial should be made at the time of its expression, but it is not too late if made before the retirement of the jury. An exception for refusal to set aside the verdict

may be made not later than the close of the term. *Gilmer v. Sydenstricker*, 42 W. Va. 52.

c. When bill of exceptions must be made.

A bill of exceptions or certificate of facts upon a trial, not made before the close of the term at which final judgment is rendered, nor within thirty days after its close, is no part of the record, and cannot be considered in this court. *State v. McGlumphy*, 37 W. Va. 805.

d. When bill of exceptions may be tendered.

If a point has been raised at the proper time, the bill of exceptions as to such point may be tendered to the court at any time during the term at which final judgment was rendered, or within thirty days after the close of the term. *State v. McGlumphy*, 37 W. Va. 806.

e. Time within which bills of exception must be signed.

Bills of exceptions must be signed, either during the term at which final judgment is rendered or within thirty days after its close, else they are no part of the record, and cannot be considered by this court. *Jordan v. Jordan*, 48 W. Va. 600.

f. Certification of bills of exception to clerk—Duty of clerk to record.

Where a judgment is rendered in a case, and the court allows thirty days, under the statute, to make up and obtain from the judge in vacation bills of exception, such bills of exception, when signed by the judge, must be certified to the clerk of the court, who must enter them upon the order-book of such court before they become a part of the record of the case. *Craft v. Mann*, 46 W. Va. 478.

g. Necessity for properly certifying bills of exception and making part of the record.

When alleged bills of exception are not properly certified and made parts of the record, this court will not consider the grounds of error thereby presented. *Furbee v. Shay*, 46 W. Va. 736.

h. When bills of exception must be noted, certified and recorded.

A bill of exceptions executed in the term must be noted in the record not later than the term of judgment. If in vacation, it must be executed and certified as executed, and ordered to be made a part of the record by the judge within thirty days after the end of the term of final judgment, and the certificate must be recorded in the law-order book, though such recordation need not be within the thirty days; otherwise, the bill will not be treated as a part of the record. *Wells v. Smith*, 49 W. Va. 78.

4. NECESSITY FOR SIGNATURE OF TRIAL-JUDGE.

a. Effect of want of signature.

b. Authority of special judge to sign.

a. Effect of want of signature.

A bill of exceptions must be signed by the judge, else it cannot be considered in the appellate court. *Adkins v. Insurance Co.*, 45 W. Va. 384.

b. Authority of special judge to sign.

A judge selected under the provisions of chapter 112, Code, to try a certain case, who does try such case, becomes the court with regard to such case for all purposes,

and may sign bills of exceptions therein within thirty days after the adjournment of the term, at which the trial is had, in all respects as though he were the regular judge of such court. *Carper v. Cook*, 39 W. Va. 346.

5. CERTIFYING THE EVIDENCE.

- a. Necessity for certifying all the evidence.
- b. Certifying the facts and not the evidence not prohibited.
- c. Necessity for certifying either the facts or the evidence.
- d. How objection to admission of evidence made available.
- e. Compelling trial-courts to sign bills of exceptions.
- f. Same—Effect of answer to rule—Requirements to sign and certify proper bills of exception.
- g. Stenographic reports—How made part of the record.
- h. Same—Consideration of when made part of certificate of evidence—Necessity for distinct specifications as to.
- i. Same—Skeleton bills of exception.
- j. Same—Time within which to certify and
- k. After-discovered evidence—Effect of failure to certify.

a. Necessity for certifying all the evidence.

Under section 9, chapter 131, Code, when exception is taken to the action or opinion of the court upon a question involving evidence upon a motion for a new trial, or otherwise, all the evidence, whether conflicting or not,

must be certified, and this court must consider all such evidence on both sides, though conflicting, not rejecting any.

If, upon such evidence, the finding of the jury plainly appears to be contrary to the evidence, or without sufficient evidence, or plainly against the decided and clear preponderance of evidence, it ought to be set aside, even though the evidence be conflicting. *Laidley v. County Court*, 44W. Va. 566.

b. Certifying facts and not the evidence not prohibited.

Section 9, chapter 131, Code, does not prohibit the supreme court of appeals from considering a case where the facts proven on the trial, and not the evidence, are certified. *King v. Jordan*, 46 W. Va. 106.

c. Necessity for certifying either the facts or the evidence.

Where a motion is made in the circuit court to set aside a verdict on the ground that the same is contrary to the evidence, and the court fails to certify all the evidence offered or all the facts proved, this court cannot review or reverse the judgment for that cause. *Isley v. Wilson*, 42 W. Va. 758.

d. How objection to admission of evidence made available.

To make available in the appellate court an objection taken during the trial to the admission of evidence, the point must be made and properly saved by some bill of exceptions. It is not enough merely to note the objection and exception in the certificate of evidence. *State v. Harr*, 38 W. Va. 59.

**e. Compelling trial-courts to sign bills of exception—
What petition must set forth.**

If an inferior court erroneously refuse to sign a bill of exceptions to its judgment in granting or overruling a motion for a new trial, on the ground that the verdict is or is not warranted by the evidence, it may be compelled to do so by *mandamus* from the appellate court; but it will not be required to do so, unless the facts or the evidence, which it is alleged the court erroneously refused to certify, are set forth in the petition for the *mandamus* or in some other proper manner brought before the appellate court, so that it may determine therefrom whether or not a *prima facie* case of error has been affirmatively made out. Otherwise, the writ of *mandamus nisi* will not be awarded. *Moragn v. Fleming*, 24 W. Va. 187.

**f. Same—Effect of answer to rule—Requirements to
sign and certify proper bills of exception.**

A judge will not be compelled by *mandamus* to sign a particular bill of exceptions, when he alleges in his answer to a rule in this court that such bill does not truly state the facts. The judge has sole power in determining whether such bill is true or not. His return to the writ is conclusive on this point and cannot be traversed. It is necessary, however, that he should settle and sign a proper bill, which he must certify, and which does contain the facts and the truth. *Cummings v. Armstrong*, 34 W. Va. 1.

g. Stenographic reports—How made part of the record.

Evidence taken down and transcribed by a shorthand reporter is not a part of the record, and can only be made so, by a proper bill of exceptions. *Tracey v. Coal Co.*, 58 W. Va. —.

h. Same—Consideration of when made part of certificate of evidence—Objections to evidence and ruling of court—Necessity for distinct specifications as to.

Where a stenographic report of evidence is made part of the certificate of evidence upon a motion for a new trial, and it shows objections to questions or evidence, and rulings of the court thereon, and that such rulings were excepted to, and the particular question or evidence complained of is specified distinctly in the motion for a new trial, or in an assignment of error, or in brief of counsel, so that the appellate court can readily and safely find the particular question or evidence to which the exception relates, the appellate court will consider the matter excepted to, though there be no formal bill of exceptions thereto; but such matter will not be considered without such specification, even though such report of evidence notes such objection and exception. *Kay v. Railroad Co.*, 47 W. Va. 467.

i. Same—Skeleton bills of exceptions.

A skeleton bill of exceptions may be adopted for the purpose of making evidence taken down and transcribed by a shorthand reporter a part of the record, but at the same time the bill is signed the evidence must be actually transcribed, and, unless it is attached to the bill, it must bear some mark of identification, such as is required in making any other paper or document a part of such bill. *Tracey v. Coal Co.*, 58 W. Va. —.

j. Same—Time within which to certify and identify such evidence.

Where a skeleton bill of exceptions is taken for the purpose of making evidence a part of the record, and where

such evidence has not been actually transcribed, or if transcribed, is not referred to in such way as to make it a part of the bill, it cannot, after the expiration of thirty days since the adjournment of the term at which final judgment was rendered, be certified and identified so as to become a part of the bill. *Tracey v. Coal Co.*, 58 W. Va. —.

k. After-discovered evidence—Effect of failure to certify.

Where there is a motion to set aside a verdict and grant a new trial on the ground of after-discovered evidence, and there is in the record no certificate of the evidence or facts proven, the bill of exceptions raising such exception will not be considered by the appellate court, it being impossible to ascertain whether the after-discovered testimony is merely cumulative or is of such a character as ought to produce a different result on a new trial. *Rutter v. Sullivan*, 25 W. Va. 427.

6. EXCLUDING EVIDENCE.

a. Necessity for relevancy of evidence excluded.

A bill of exception to the action of the court in excluding the evidence offered is not available as ground of error, unless it shows that the evidence was, or would have been, relevant, material and important. *Snooks v. Wingfield*, 52 W. Va. 442.

7. WHAT ORDER-BOOK AND RECORD OF TRIAL-COURT MUST SHOW—ALTERATION OF THE RECORD.

- a. What necessary to make part of the record.**
- b. Necessity for order filing bills of exception.**

- c. What order of trial-court must show.
- d. What order book of trial-court must show.
- e. What the record must show.
- f. Memoranda made on record book of trial-court.
- g. Instructions copied into the record.
- h. Copy of paper attached to pleadings.
- i. Reference to papers that may be safely copied into the record.
- j. Papers purporting to be part of bills of exception.
- k. Identification papers not incorporated into the bill of exceptions.
- l. Identification of papers referred to.
- m. Alteration of the record—How record restored—Inserting matter not part of the record.

a. What necessary to make part of the record.

The mere fact that a bill of exceptions appears to have been signed by the judge, and is found among the papers of the case, does not make it a part of the record of the case. To make such bill of exceptions a part of the record so that the appellate court may consider it, the record of the proceedings of the court must show substantially, that the bill of exceptions was tendered, received and signed, and directed to be made a part of the record. *Wickes v. Railroad Co.*, 14 W. Va. 178.

b. Necessity for order filing bills of exception.

It is *stare decisis* rule of this court that a bill of exceptions copied into the record, when there is no order filing the same, is not a true part of the record, and will not be considered. *Mayer v. Frobe*, 40 W. Va 248.

c. What order of trial-court must show.

Where the record does not show that a bill of exceptions had been made a part of the record by order of the court below, the appellate court will not consider it a part of the record, and will not look to it for any purpose upon a writ of error. *Phelps v. Smith*, 16 W. Va. 522.

d. What order book of trial-court must show.

The record entered in the law order book of a circuit court must attest that a bill of exception was executed and made part of the record, else such bill cannot be considered, though inserted in the record by the clerk. *Adkins v. Insurance Co.*, 45 W. Va. 384.

e. What the record must show.

The record entered in the law-order book of a circuit court must attest that a bill of exception was executed and made part of the record, else such bill cannot be considered, though inserted in the record by the clerk. If the record attests its execution, the bill will be considered. *Adkins v. Insurance Co.*, 45 W. Va. 384, 386.

f. Memoranda made on record book of trial-court.

If on the record-book a memorandum is made of exceptions taken by the plaintiff to the rulings and decisions of the court, one of which is an exception to an instruction given to the jury, and the other an exception to the refusal of the court to award a new trial, in which the evidence is all certified, upon a writ of error this court will review the rulings and decisions of the court, though the objection to the refusal of the court to award a new trial was not entered on the face of the record-

book, except by the noting of these exceptions and making them thus a part of the record, and thus showing on their face, that these rulings and decisions of the court, including the refusal to grant a new trial, were objected to by the plaintiff. *Van Winkle v. Blackford*, 28 W. Va. 671.

g. Instructions copied into the record.

Instructions copied into the record, when there is no bill of exceptions or order of the court referring to them, will not be regarded as part of the record. *Winters v. Null*, 31 W. Va. 450.

h. Copy of paper attached to pleadings—Presumption as to.

A copy of a paper attached to a pleading in the case which purports to be the same as the paper mentioned in the bill of exceptions, does not make it a part of that bill, nor can this court presume that it is the same paper read in evidence and excepted to. *McKendree v. Shelton*, 51 W. Va. 516.

i. Reference to papers that may be safely copied into the record.

When a bill of exceptions makes such reference to a paper as will enable it to be safely copied into the record, and acted on as a true paper, said reference makes said paper a part of said bill. *Gunn v. Railroad Co.*, 37 W. Va. 421.

j. Papers purporting to be part of bills of exception.

A paper purporting to be a bill of exceptions and copied into the record as such, will not be regarded or treated by

the appellate court as a part of the record, unless the record shows that it was by some order or memorandum entered on the order book of the trial-court, made a part of the record. *Koontz v. Koontz*, 47 W. Va. 31.

k. Identification of papers not incorporated in the bill of exceptions.

When a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions, otherwise it will be disregarded. *McKendree v. Shelton*, 51 W. Va. 516.

l. Identification of papers referred to.

Where a record or other writing makes such reference to another writing by number, or other earmark, so that it may be safely identified, that makes such writing a part of the record or writing referring to it. *Hughes v. Frum*, 41 W. Va. 446.

m. Alteration of the record—How record restored—Inserting matter not part of the record.

If a record of a circuit court has been altered, it can be restored to its original state only in that court, and not by the supreme court on writ of error or appeal; though when so restored in the circuit court, and certified to the supreme court, it will be there treated as in its true and restored state. But where a bill of exceptions or memorandum of such bill, or any document, is inserted in a transcript of the record, which is no part of the record, that fact may be shown in the supreme court,

and will be treated as no part of the record. *Wells v. Smith*, 49 W. Va. 79.

8. SETTING ASIDE THE VERDICT.

- a. Necessity for motion for—Waiver of errors.
- b. Same—Waiving exceptions.
- c. When the judgment is plainly right.
- d. When the verdict is not supported by the evidence.
- e. How verdict regarded by appellate court.
- f. Verdict based on mere conjecture—Burden of proof.
- g. Weighing the evidence by the appellate court.
- h. Preponderance of evidence.
- i. Irrelevant evidence.
- j. Conflicting evidence.
- k. Wholly insufficient evidence.
- l. Illegal evidence.
- m. Newly discovered evidence—Presumption as to.
- n. Harmless error.

a. Necessity for motion for.—Waiver of errors.

In a case tried by a jury, no matter how many exceptions are taken to rulings of the court during the trial, unless a motion is made in the trial-court to set aside the verdict, and that motion is overruled and an exception taken, or objection made to the overruling of such motion is noted on the record, all such errors will, by the appellate court, be deemed to have been waived. *State v. Thompson*, 26 W. Va. 150.

b. Same—Waiving exceptions.

Where exceptions are taken during the trial to the

judgment of the court in giving or refusing to give instructions to the jury, or in admitting or rejecting evidence, unless a motion is made in the trial-court to set aside the verdict, and that motion is overruled, the appellate court will regard such exceptions as waived and will not review the rulings. *Brown v. Brown*, 29 W. Va. 777.

c. When the judgment is plainly right.

Where, on consideration of the whole record, the judgment is plainly right, this court will not reverse the judgment for errors of law, which if not committed, would not have produced a different result. *Bank v. Napier*, 41 W. Va. 482.

d. When the verdict not supported by the evidence.

Where the verdict of a jury is wholly without evidence on a point essential to a finding, or the evidence is plainly insufficient to warrant such finding by the jury, the same should be set aside and a new trial awarded. *Vintroux v. Simms*, 45 W. Va. 548.

e. How verdict regarded by appellate court.

The verdict of a jury will be held sacred by this court unless there is a plain preponderance of credible evidence against it, evincing a miscarriage of justice from some cause, such as prejudice, bias, undue influence, misconduct, oversight, or misconception of the facts or law. *Young v. R. R. Co.*, 44 W. Va. 218.

f. Verdict based on mere conjecture—Burden of proof.

A verdict based alone on mere conjecture, without evidence to support it, where the rule as to the burden of

proof requires some reliable affirmative evidence, should not be permitted to stand. *Robinson v. Railroad Co.*, 40 W. Va. 583.

g. Weighing the evidence by the appellate court.

Why have juries if appellate judges are to go into the weighing of evidence as if by the ounce or pound? We ought not do this. It is an abuse of power and a misconception of our functions and of the jury function. The jury institution is sacred under our Constitution and a verdict is to be highly respected. *State v. Bowyer*, 43 W. Va. 182.

h. Preponderance of evidence.

When the evidence plainly, clearly and decidedly preponderates against the verdict of the jury this court will grant a new trial. *Limer v. Traders Co.*, 44 W. Va. 175.

i. Irrelevant evidence.

To authorize the reversal of a judgment, for the reason that irrelevant evidence has been admitted, the evidence must not only be irrelevant, but it must be of such a nature, that its admission may have prejudiced the acceptor. *State v. Kinney*, 26 W. Va. 141.

j. Conflicting evidence—Weight of evidence.

Though evidence is conflicting, the court may set aside the verdict if against the weight of the evidence; but such power should be exercised cautiously. When the court does so, its action is regarded with peculiar respect in an appellate court and will not be reversed unless plainly wrong. *Crogan v. Railroad Co.*, 39 W. Va. 415.

k. Wholly insufficient evidence.

Where the court which tries a case certifies all the evidence adduced on the trial, and from the evidence so certified it clearly appears that it was wholly insufficient to sustain the verdict, this court will set aside the verdict, and, in a proper case, award a new trial.

State v. Zeigler, 40 W. Va. 594.

l. Illegal evidence—Presumption as to.

Where illegal evidence is admitted, against the objection of a party, it will be presumed that it prejudiced such party, and if it may have prejudiced him, though it be doubtful whether it did or not, it, it will be cause for reversal of the judgment; but if it clearly appear that it could not have changed the result,—that if it had been excluded, the same result would have followed,—it will not be cause for reversing the judgment. *Taylor v. Railroad Co.*, 33 W. Va. 40.

m. Newly discovered evidence—Presumption as to.

A new trial will not be granted on the ground of newly discovered evidence unless the case comes within the following rules:

1. The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained.

2. It must appear from facts stated in his affidavit that the party seeking a new trial was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before verdict.

3. Such evidence must be new and material, and not

merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point.

4. The evidence must be such as ought to produce an opposite result at a second trial on the merits.

5. And the new trial will be generally refused when the sole object of new evidence is to discredit or impeach a witness on the opposite side. *Halstead v. Horton*, 38 W. Va. 727.

n. Harmless error.

An error which does not prejudice a party cannot be made the cause of a reversal of a judgment. *Long v. Perine*, 44 W. Va. 243.

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PART II.

FORMS OF INSTRUCTIONS.

CHAPTER 1.

ACCORD AND SATISFACTION.

- a. What may be pleaded.
- b. When acceptance by creditor of order operates as full satisfaction of debt.
- c. When creditor liable to debtor for negligence in collecting collateral accepted in discharge of debt.
- d. How plea established.
- e. When receipt given by plaintiff does not bar right of recovery.

a. What may be pleaded.

The court instructs the jury that anything of legal value, whether those in possession or in action, that is, any legal interest or right which the creditor had before agreed to receive and actually received in full satisfaction of the debt, is a good satisfaction, without regard to the comparative magnitude of the satisfaction with the original debt, and may be pleaded as accord and satisfaction. *Bank v. Kimberlands*, 16 W. Va. 569.

b. When acceptance by creditor of order operates as full satisfaction of debt.

The court instructs the jury that if they believe from the evidence that the order for \$—— given in evidence in this case was drawn by the defendant, —— ——, in favor of the plaintiff upon a fund in the hands of the —— company, belonging to or payable to the said defendant, and that the said order for \$—— was delivered by the said defendant or some one in his behalf and by his authority, to the plaintiff in discharge and satisfaction of the notes here sued upon, and was received by the plaintiff in discharge and satisfaction of said notes, that such delivery by the said defendant and receipt by the plaintiff would operate in law as a full discharge and satisfaction of said notes. *Bank v. Kimberlands*, 16 W. Va. 569.

c. When creditor liable to debtor for negligence in collecting collateral accepted in discharge of debt.

The court instructs the jury that if they believe from the evidence that the order for \$—— given in evidence in this cause was drawn by the defendant in favor of the plaintiff upon a fund in the hands of ——, belonging or payable to the said defendant and sufficient to leave a surplus after paying the orders in favor of ——, —— and ——, mentioned in said order for \$——, and that said order for \$—— was delivered by said defendant, or some one on his behalf and by his authority, to the plaintiff as collateral security for the payment of the notes here sued upon, then it would be the duty of the plaintiff to use reasonable care and diligence to make the said security available for the purpose for which it had so been delivered and received, and if the plaintiff, by negligence or any wrongful act or omission on his part, thereafter rendered the said security, in whole

or in part, unavailable for the purpose for which it had been so delivered and received, the loss, if any, thus caused should be borne by the plaintiff, and the defendants would be discharged to the extent of the injury they sustained from such negligence or misconduct of the plaintiff. *Bank v. Kimberlands*, 16 W. Va. 570.

d. How plea established.

The court instructs the jury that to establish the plea of accord and satisfaction, the defendants must show that the subject matter of this action (that is the arrest and imprisonment of the plaintiff) was accorded between the plaintiff and ———, and that the plaintiff agreed to and did accept the ——— dollars mentioned in the said receipt, in full satisfaction of the cause of action in the declaration mentioned. *Bloss v. Plymale*, 3 W. Va. 399.

e. When receipt given by plaintiff does not bar right of recovery.

The court instructs the jury unless they believe from the evidence that ———, was a co-trespasser with the present defendants in this action, in the arrest and imprisonment of the plaintiff in the declaration mentioned, then the receipt read in evidence in this cause, given by ———, (the plaintiff) to ———, does not operate to bar plaintiff's right of recovery herein. *Bloss v. Playmale*, 3 W. Va. 400.

CHAPTER 2.

ADVERSE POSSESSION.

1. COLOR OR CLAIM OF TITLE—SOURCE OF TITLE—BOUNDARY LINES.
2. ACTUAL POSSESSION—WHAT REQUIRED TO SUPPORT CLAIM OF.
3. QUANTITY OF LAND CONVEYED — CONVEYANCES BY METES AND BOUNDS.
4. HOSTILITY IN INCEPTION—CONTINUED HOSTILITY.
5. CONTINUITY OF POSSESSION.
6. PAYMENT OF TAXES—FORFEITURE FOR NON-PAYMENT OF TAXES.
7. STATUTE OF LIMITATIONS.

1. COLOR OR CLAIM OF TITLE—SOURCE OF TITLE—BOUNDARY LINES.
 - a. What party relying on under color or claim of title must show.
 - b. Same—Not necessary that evidence of title be in writing—Specified boundaries.
 - c. Color of title—Character of deed which gives color of title.
 - d. Distinction between claim of title and color of title—Claim of title—Limitation of adverse holdings under—Color of title—Limitation of adverse holdings under.
 - e. Deed conveying title—Effect of delivery of.
 - f. Same—When statute of limitations begins to run.
 - g. Source of title—Conflicting title arising from same source.
 - h. Boundary lines.

a. What party relying on under color or claim of title must show.

The court instructs the jury that the party who relies on adverse possession of land, under color or claim of title, to defeat the legal owner of the land must show:

1. His color or claim of title and that it covers the land, or a part of the land, in controversy.

2. That he entered under said claim or color of title upon said land in controversy, or some part thereof.

3. That his entry was hostile and adverse to the party having the legal title and was actual, visible and exclusive.

4. Must have so continued hostile, actual, visible, and exclusive, unbroken, under said color or claim of title for ten years before the commencement of the action to dispossess him. *Maxwell v. Cunningham*, 50 W. Va. 302.

b. Same—Not necessary that evidence of title be in writing—Specified boundaries.

The court instructs the jury that color or claim of title which may be sufficient to establish title to land by adverse possession, may be under a good or bad, legal or equitable title; that it is not indispensable that the claim of title should be in the form of a deed or other writing; that the claim, from its nature or character, may be wholly independent of any written evidence; and that if a party have a deed or other writing with a specified boundary, the possession which he may take and hold is not necessarily restricted or confined to what shall prove to be within the precise boundary of such deed or writing; he may take and hold actual possession of land outside of his true boundary. *Congrove v. Burdett*, 28 W. Va. 223.

c. Color of title—Character of deed which gives color of title.

The court instructs the jury that a deed in writing

which purports to convey lands by metes and bounds and pass a title thereto, is color of title, no matter in what its invalidity may consist. *Robinson v. Lowe*, 50 W. Va. 82.

d. **Distinction between claim of title and color of title—
Claim of title—Limitation of adverse holdings under
—Color of title—Limitations or adverse holdings
under.**

The court instructs the jury that if the adverse possession should be held for ten years before the commencement of the action under claim of title, the person claiming adversely will be limited in his adverse holdings to his actual enclosures, if under color of title then the adverse holding will extend to the boundaries contained in the deed or writing that constitutes his color of title. *Maxwell v. Cunningham*, 50 W. Va. 301.

e. **Deed conveying title—Effect of delivery of—Adverse
possession—What necessary to establish.**

The court instructs the jury that if they believe from the evidence that the land in controversy is embraced in and conveyed by the deed from —— to ——, and they by said —— to the plaintiff, then they must find for the plaintiff, unless they further believe from the evidence that the defendant had been in exclusive, actual, continual, visible, hostile and notorious possession of the land for more than ten years prior to the commencement of this action, claiming the same under claim or color of title, adversely to the plaintiff, and those under whom his title is derived; and the jury is also instructed that the claim of the defendant, derived from —— and his vendor, could not be adverse to the plaintiff, or those under whom he claims, until the deed of —— was delivered to said defendant, and from that time it was adverse. *Low v. Settle*, 32 W. Va. 603.

f. Same—When statute of limitations begins to run.

The court instructs the jury that if they believe from the evidence that the land in controversy is embraced in and conveyed by the deeds from —— to ——, trustee, and from —— (another trustee) to the plaintiff, then they must find for the plaintiff, unless they further believe from the evidence that the defendant and those under whom he claims, have been in the exclusive, actual, continued, visible, hostile and notorious possession of the land for more than ten years prior to the commencement of this action claiming the same under claim or color of title adversely to the title of the plaintiff and those under whom his title is derived; and they are also instructed that the title of the defendants derived from —— was not adverse to that of the plaintiff until the deed from —— to ——, offered in evidence, was delivered by —— to ——, and from that time it was adverse. *Core v. Faupe*, 24 W. Va. 249.

g. Source of title—Conflicting titles arising from same source—Priority of recordation of deeds.

The court instructs the jury that if they believe from the evidence that the deed from A. to B., under which the defendant claims, covers the land in controversy, and if they further believe from the evidence that the deed from A. to C., under which the plaintiff claims, also covers the land in controversy, and if they further believe from the evidence that the deed to C. was first admitted to record in the proper office for recording said deeds, then the said deed from A. to C. vested in said C. a valid title to said land in controversy unless the jury believe from the evidence that the said C. had notice that the said deed to B., which is older in date than the deed to C., covered the land in controversy and that B. claimed title thereto. *Congrove v. Burdett*, 28 W. Va 222.

h. Boundary lines.

The court instructs the jury that in ascertaining the boundaries of a tract of land described in a grant or deed, natural boundaries or lines of marked trees will be established in preference to mere course and distance; and where there are no natural boundaries and lines of marked trees to be relied on to establish such boundaries, the courses and distances called for in such deed or grant will control. *Congrove v. Burdett*, 28 W. Va. 222.

2. ACTUAL POSSESSION—WHAT NECESSARY TO SUPPORT CLAIM OF.

- a. Enclosures—What intruder not limited to—Possession of part of the land—Interlocks.
 - b. Same—Superiority of title.
 - c. Same.
 - d. Same—Adverse possession at time of and since entry.
 - e. Same—Adverse possession in third party.
 - f. Same—Breach of covenant—Statute of limitations.
 - g. Improvements made upon the property.
-
- a. Enclosures—What intruder not limited to—Possession of part of the land—Interlocks.

The court instructs the jury that if they believe from the evidence that the land embraced in the deed from A. to B. for — acres includes the land in controversy, and that the land conveyed by C. to D. in 18— was surveyed for said D. by said C., and includes in its boundaries the land in controversy, then the land in controversy is the lap, interlock or intefereference; and if the jury believe from the evidence that said D., and those who claim under him, including the defendant, entered upon and

took possession of any part of the land in controversy and actually improved any part of the same by enclosure and exercised other open, visible, notorious and habitual acts of ownership over the land in controversy; and if the jury further believe from the evidence that the said B. and those who claim under her, never in fact took actual possession of any part of the land lying within the disputed boundaries, the lines shaded green on the plat in this cause, but did enter and take possession of some part of the land embraced in her deed for — acres *outside* of the land in controversy, then such possession by said B., and those who claim under her, of any part of the said — acres *outside* of the lap or interlock, shaded in green, does not give to the plaintiffs, or those under whom they claim, possession, actual or constructive, or any part of the land in controversy, and does not limit the defendant to the actual enclosure, even if the jury should believe the title of B. to the — acres to have been the better title. *Congrove v. Burdett*, 28 W. Va. 223.

b. Same—Possession of any part of the land—Superiority of title.

The court instructs the jury that if they believe from the evidence that the defendant, and those under whom he claims, entered upon and took possession of any part of the land in controversy, claiming it under color or claim of title by deed or other writing, then the defendant, and those under whom he claims, thereby acquired adversary possession of such land to the extent of the boundaries embraced by such deed or other writing, unless the jury believe from the evidence that the plaintiff, or those under whom he claims, had the better title and had actual adverse possession of the part of the land embraced by the deed or other writing under which the defendant, or those under whom he claims, entered and took pos-

session of said land in controversy. *Congrove v. Burdett*, 28 W. Va. 223.

c. Same.

The court instructs the jury that if the defendant, or those under whom he claims, under a deed or other writing, entered and took possession of any part of the land in controversy under such deed or other writing, and held such adversary possession of said land under such deed or other writing, then such adversary possession of any part of said land is to be taken and held to extend to the boundaries embraced and included by such deed or other writing, notwithstanding some other person may have the better title to such land, and the jury must find for the defendant unless the person having the better title shall have actual adverse possession of some part of the land embraced by such deed or other writing under which the defendant, and those under whom he claims, entered upon and took possession of the land in controversy. *Congrove v. Burdett*, 28 W. Va. 223.

d. Adverse possession at time of and since entry.

The court instructs the jury that if they believe from the evidence that the person under whom the ——— hold were at any time ten years prior to the institution of this suit, and still are the actual owners by a paramount title of the ——— surveys described in the title papers and evidence in this case; that said ——— surveys are contiguous; and that the said ——— or those under whom he holds, at any time ten years prior to the institution of this suit entered upon and took possession of any part of either of the said surveys, claiming under said title; and that there was not at the date of such entry, and has not been since, any actual, visible adverse possession of the land embraced in the interlock herein—

then the verdict should be for the defendant. *Ilseley v. Wilson*, 42 W. Va. 764.

e. Same—Adverse possession in third party.

The court instructs the jury that if they believe from the evidence that ———, the holder of the alleged paramount title and those under whom he claims, owns under said alleged paramount title, several contiguous and coterminous tracts, pieces or parcels of land, embracing the land in controversy shown on the map made and filed in this case as the lap or interlock, and at any time prior to the conveyance by ——— to the plaintiff, dated the ——— day of ———, 18—, and shown in evidence, had taken and held actual possession of any part or parcel of any of the said coterminous tracts not in the actual adverse possession of some third person, and including, as well, the wild and uninclosed land as the improved land; such possession is held to include the alleged interlock, however far it may be removed from the actual inclosure, provided the said interlock was not then in the actual adverse possession of some person claiming under the ——— title. *Ilseley v. Wilson*, 42 W. Va. 763.

f. Breach of covenant—Statute of limitations.

The court instructs the jury that if they believe from the evidence that at the time of conveyance from the defendant to ———, shown in evidence, and bearing date ——— day of ———, 18—, that the part of the land thereby attempted to be conveyed, embraced by the alleged interlock or lap with the ——— survey of ——— acres, now claimed by the ———, was in the actual possession of those under whom said ——— claims by a title paramount to the title conveyed by said ——— to ———, then there was a breach of said covenant in said conveyance *eo instanti*, and if more than ten years elapsed from that time before the bringing of this suit, the action

is barred, and the jury should find for the defendant. *Ilsey v. Wilson*, 42 W. Va. 763.

g. Improvements made upon the property.

The court instructs the jury that the making of improvements by the defendant upon the property in controversy will not prevent the plaintiff from recovering the possession thereof in this action. *McDougal v. Musgrave*, 46 W. Va. 514.

3. QUANTITY OF LAND CONVEYED.

a. Conveyance by metes and bounds.

The court instructs the jury that the fact that the deed from ——— to ——— conveys by metes and bounds to said ——— more than ——— acres should not be taken into consideration by you in determining the matters in controversy in this action. *Robinson v. Loece*, 50 W. Va. 83.

4. HOSTILITY IN INCEPTION—CONTINUED HOSTILITY.

- a. Entry under title of legal owner—How controverted.
 - b. Holding by vendee as against vendor—Executory contracts.
 - c. Holding by tenant as adverse to landlord.
 - d. Holding by co-tenant as adverse to co-tenant.
 - e. Same—Notice of change of relationship—Necessity for.
 - f. Life-estate of landlord—Nature of title of both landlord and tenant.
 - g. Same—Expiration of landlord's life estate.
- a. Entry under title of legal owner—How controverted.**
- The court instructs the jury that the defendant to make

out a title by adverse possession, must show that such possession was adverse in its inception, and where the entry is under the title of the legal owner, the holder cannot controvert that title without an express disclaimer or its equivalent, and the assertion of an adverse title with notice to the owner. *Maxwell v. Cunningham*, 50 W. Va. 302.

b. Holding by vendee as against vendor—Executory contracts—Future conveyances.

The court instructs the jury that if they believe from the evidence that the defendant entered into possession of the land in controversy under an executory contract which left the legal title in his vendor, and contemplated a further conveyance of the complete title, his entry was in subordination to the legal title, and in that event a privity existed which precluded the idea of a hostile or tortious possession that could silently ripen into an adverse possession under the statute of limitations. *Low v. Settle*, 32 W. Va. 603.

c. Holding by tenant as adverse to landlord—Relation of landlord and tenant—Life-estate of landlord.

The court instructs the jury that a tenant can not deny the title of the landlord and to the extent that the relation of landlord and tenant existed between the plaintiff and defendant, the defendant is precluded from denying the title of the plaintiff to the life estate claimed by her in the premises in controversy, and is precluded from taking any advantage of his position and possession as such tenant to do anything to defeat the right of the plaintiff without showing that he first brought home notice to her that he was holding the said premises adversely to her life estate therein. *McDougal v. Musgrave*, 46 W. Va. 513.

d. Holding by co-tenant as adverse to co-tenant—Waiver of rights.

The court instructs the jury that if they believe from the evidence that A., (father of the defendant B.,) and C. executed an agreement in writing bearing date the —— day of ——, and that the paper purporting to be a copy thereof introduced in evidence is a copy of said agreement, then from the time of the execution of said contract the said C. was the owner of all the land in the declaration described except as to one undivided sixth of that portion of the land described in said agreement by metes and bounds until the time of his death; and that at his death the plaintiff became the owner thereof; and if they further believe from the evidence that D., son of said A., claiming to have acquired the interest formerly held by his father in said land (except the share of his brother B.) executed the deed to the defendant B., bearing date the —— day of ——, a copy of which was introduced in evidence, and if they further believe from the evidence that the defendant, E., went into possession of part of the land in controversy in 18—, after the execution of said deed to the defendant B., under the verbal agreement with his father, and had remained in possession ever since, such possession under the evidence and circumstances in this case was not adverse to said C. or the plaintiff before the recordation of said deed on the —— day of ——, unless it is shown by the evidence that before the recordation of the said deed and ten years before the institution of this suit notice was brought home to the plaintiff, or to her father, C., that the defendants were holding adversely and claiming all the land in controversy, and the plaintiff is entitled to recover from the defendants the land in controversy except the one undivided sixth interest in that portion of the —— acres, described in the paper offered in evi-

dence as a copy of an agreement between C. and A., as to which undivided sixth the plaintiff has waived her right to recover. *Parr v. Currence*, 53 W. Va. 529.

e. Same—Notice of change of relationship—Necessity for.

The court instructs the jury that if they believe from the evidence that the defendant entered into the possession of the premises in controversy under an agreement and understanding with the plaintiff by which he was to occupy said premises with the plaintiff, the plaintiff not paying the defendant board and the defendant on the other hand not paying the plaintiff rent then the possession of the defendant would not under such circumstances be hostile, adverse or exclusive as to the plaintiff and would not become hostile, adverse or exclusive as to the plaintiff until the defendant brought home notice to the plaintiff of a change in such arrangement and that he claimed the premises adversely to her life estate and until the defendant brought home to her notice of such change and claim to hold adversely such possession by the defendant would not be adverse, and would not be the basis of any adverse claim by the defendant. *McDougal v. Musgrave*, 46 W. Va. 514.

f. Life estate of landlord—Nature of title of both landlord and tenant.

The court instructs the jury that if they believe from the evidence that the plaintiff and defendant claim title under the deed of ——— —, 18—, from plaintiff to ——— and of ——— —, 18—, from ——— to the defendant, then by the provisions of said deed the plaintiff is entitled to the possession of the premises in controversy for and during her natural life, and if the plaintiff permitted the defendant to come upon the premises with his family and occupy the premises with her the said

plaintiff, then the said defendant became and was during the period of such occupancy the tenant of the plaintiff of such premises, and if such permissive occupation was without any term of holding being fixed and without the payment of rent, then such occupancy was at will, and the plaintiff is entitled to have possession of said premises upon demand. *McDougal v. Musgrave*, 46 W. Va. 513.

g. Same—Expiration of landlord's life estate—Tenant's remainder in fee dependent upon.

The court instructs the jury that if they believe from the evidence that the plaintiff and defendant claim title under the deed of ———, 18—, from the plaintiff to ——— and the deed of ———, 18—, from said ——— to the defendant offered in evidence in this case and that by reason of said deeds the plaintiff has an estate for and during her natural life in the property in the declaration mentioned and the defendant a remainder in fee in said premises dependent upon the expiration of said life estate, unless the defendant shows that the plaintiff has in some way lost said life estate she is entitled to recover in said action. *McDougal v. Musgrave*, 46 W. Va. 514.

5. CONTINUITY OF POSSESSION.

- a. Tacking on different adverse possessions.
- b. Necessity for connecting title—Lengthening possession.
- c. Possession limited to color of title—Actual enclosures.

a. Tacking on different adverse possessions.

The court instructs the jury that if they believe from the evidence that A. went into possession of the ———

acres of land in controversy under one B., and that the defendant afterwards took possession under claim or color of title derived from C., and that there was no privity of estate between B. and C., then the possession of said A. of said ——— acres under B. can avail the defendant nothing in his defense of adversary possession under claim or color of title under C.; that these two possessions cannot be tacked onto each other so as to make a continuity of possession, unless there is a privity of estate, or the two titles are connected. *Jarrett v. Stevens*, 36 W. Va. 449.

b. Necessity for connecting title—Lengthening possession.

The court instructs the jury that any possession by any party, of the land in controversy, other than the defendant, cannot inure to the benefit of the defendant, so as to lengthen and strengthen his possession, unless he connect the title by which he claimed under the title of such other person. *Jarrett v. Stevens*, 36 W. Va. 450.

c. Possession limited to color of title—Actual enclosures.

The court instructs the jury that the defendant can only show adversary possession of land to which he has shown color of title, or which he has had under fence, and if he claims by fence, he can only claim to the extent of actual enclosure. *Jarrett v. Stevens*, 36 W. Va. 451.

6. PAYMENT OF TAXES—FORFEITURE FOR NON-PAYMENT OF TAXES.

a. Payment of taxes by one holding title under void judicial sale.

b. Same—Privity of estate between purchaser and legal owner.

- c. Title acquired by purchaser at tax sale.
- d. How contiguous tracts owned by same person may be assessed.
- e. Assessment and payment of taxes on life-estate—
Payment of taxes by tenant holding fee simple in lands.
- f. Same.
- a. **Payment of taxes by one holding title under a void judicial sale.**

The court instructs the jury that if they believe from the evidence that the defendant claimed to hold possession of the land in controversy, by virtue of the deed made to him in the proceedings in the chancery suit of ——— *vs.* plaintiff, (said deed having been declared void by the supreme court), that the failure of the plaintiff to cause the land to be entered on the assessor's books of ——— county, for the year 18— to the year ———, inclusive, nine years), does not work a forfeiture of his title, so as to defeat his right to recover the land in controversy in this suit, because the land was assessed on the assessor's books of the county of ———, in the name of the defendant and taxes paid thereon by him for the said years 18— to 18—, inclusive, under his said claim of title derived from the deed made to him by virtue of said chancery suit, (said deed having subsequently been declared invalid by the supreme court). *Hall v. Hall*, 27 W. Va. 472.

- b. **Same—Privity of estate between purchaser and legal owner.**

The court instructs the jury that if they believe from the evidence that the defendant purchased the property in question and entered into possession thereof, under and by virtue of a deed made on the ——— day of ———, 18—, by ———, special commissioner in the chancery cause of ——— *vs.*,

the plaintiff, (which deed was subsequently declared void by the supreme court of appeals), and that the property conveyed by said deed was the property which had been claimed, owned and occupied by plaintiff by virtue of a purchase made by him in 18—, that the then said commissioner, acting under and by virtue of said decree, was the agent of the plaintiff and the defendant, and that the relationship of vendor and vendee subsisted between them, and although the said deed made by said commissioner was, by a subsequent decision of the supreme court of appeals of West Virginia, declared to be invalid and set aside; that the fact that the defendant entered into possession of the property under and by virtue of the deed made by a court of competent jurisdiction, establishes such a privity of estate in respect to the rights of the parties plaintiff and defendant in this suit, so that the assessment on the assessor's books to and payment of taxes on said property by the defendant inures to the benefit of the plaintiff, and will not work a forfeiture of the land in controversy. *Hall v. Hall*, 27 W. Va. 476.

c. Title acquired by purchaser at tax sale—How title defeated.

The court instructs the jury that if they believe from the evidence that ——— was a creditor of ———, and as such, paid the taxes on the land in controversy for the years for which it was returned delinquent, then the same was improperly returned delinquent, and the tax deed conferred no title on the purchaser at the tax sale. *Carrell v. Mitchell*, 37 W. Va. 140.

d. How contiguous tracts owned by same person may be assessed.

The court instructs the jury that if a person has his land charged upon the land books in a large tract that covers all his smaller tracts or any of his smaller tracts,

it is not necessary for him to have it charged to him in the small tracts, and no forfeiture can accrue to those small tracts by reason of their not being so charged as small tracts, if they are included in the large tracts. In other words, coterminous tracts of land belonging to the same person for the assessment and payment of taxes are the same as one tract. *Maxwell v. Cunningham*, 50 W. Va. 301.

**e. Assesment and payment of taxes on life estate—
Payment of taxes by tenant holding fee simple in
land.**

The court instructs the jury that if they believe from the evidence that the plaintiff and defendant claim title to the premises in controversy under the deed of ———, 18—, from the plaintiff to ——— and of ———, 18—, from said ——— to the defendant and under the provisions of said deeds the plaintiff has an estate for and during her natural life in said premises and the defendant a remainder in fee therein dependent upon the expiration of said life estate, and the assessment of said life estate and remainder in fee in the form of the fee to the said defendant, would enure to the benefit of the said plaintiff, and a forfeiture of her life estate would not be caused by a failure under such circumstances to have such life estate assessed separately in her name, unless before such failure to have the same assessed to her separately the plaintiff had notice that the defendant was holding and claiming the entire property adversely to her. *McDougal v. Musgrave*, 46 W. Va. 514.

f. Same.

The court instructs the jury that if they believe from the evidence that prior to and at the time of the institution of this action the plaintiff had a life estate in the

premises in controversy and that during the time she so had such life estate she permitted the defendant to enter up-said premises and become her tenant therein, then the jury are instructed that an assessment of said property in the name of the defendant, the tenant as aforesaid, and the payment of the taxes upon the property by such defendant while such tenancy continued, and before the plaintiff had any notice of a hostile holding of the premises by the defendant, would be a payment of the taxes for the plaintiff and would enure to her benefit and prevent a forfeiture of said land for failure to assess in her name. *McDougal v. Musgrave*, 46 W. Va. 513.

7. STATUTE OF LIMITATIONS.

- a. Against both possession and title.
- b. Same—Superiority of title.

a. **Against both possession and title.**

The court instructs the jury that the effect of the statute of limitations in this action is to render a continued adversary possession for ten years prior to the commencement of this action conclusive not only against the possession but also against the title of the true owner whoever he may be. *Congrove v. Burdett*, 28 W. Va. 223.

b. **Same—Superiority of title.**

The court instructs the jury that if they believe from the evidence that the defendant, and those under whom he claims, have been in the exclusive, hostile, actual, continued, visible and notorious possession of the land in dispute for more than ten years prior to the commencement of this action, claiming the same under claim or color of title adversely to the title of the plaintiffs, and those under whom their title is derived, then they must find for the

defendant, notwithstanding the jury may believe from the evidence that the plaintiff's title, but for such adverse possession, is the better one. *Congrove v. Burdett*, 28 W. Va. 223.

CHAPTER 3.

AGENCY.

- a. The relation between principal and agent.
 - b. Scope of authority of agents.
 - c. Same.
 - d. Same—Agents want of authority.
 - e. Same.
 - f. Employment of third party by agent.
 - g. False representations by agents—Concealment of facts by agent.
 - h. Same.
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- a. **Relation between principal and agent—Limit of Authority of agent to buy on credit.**

The court instructs the jury that if they believe from the evidence that the relation between defendants and ——— was such that defendants furnished ——— with a sum or sums of money, and sent him into market simply to invest such moneys in wheat for them, then ——— had no authority to buy wheat for defendants on credit. But if the jury believe from the evidence that ——— was authorized to go into the market and buy wheat generally, for defendants, or if ——— was authorized to make contracts for wheat and repay himself by drafts on defendants, or if from the course of dealing the jury are satisfied that ——— was in the habit of buying wheat and forwarding it to defendants, and defendants knowingly

received it as being in greater amount than their advances in cash, that then defendants would be liable unless they had in the due course of the business of said defendants and ———, touching the premises, made advances to said ——— sufficient to pay for the wheat so received, or he will be liable for so much as may be covered by these advances. Or if the jury shall find that defendants have received wheat beyond the amount of the advances, and which was sold to ———, and by him purchased as the private agent of the defendants, the plaintiff would be entitled to recover to the amount of such wheat in excess over the advances to the amount of his proof. *Detwiler v. Greene*, 1 W. Va. 113.

b. Scope of authority of agent—Ratification of acts of agent—Benefits received and accepted by principal.

The court instructs the jury that if they believe from the evidence that ——— was the agent of the defendant in the purchase of the claim of the plaintiff, without he made positive false representations of material facts or concealed facts which it was his duty to communicate to the plaintiff, and that such representations or concealments of such facts were made or withheld by the agent at the time of the purchase of said claim, or if they believe from the evidence, that the agent in making such representations or concealments acted beyond the scope of his authority, yet if they further believe from the evidence that the defendant ratified the purchase of the plaintiff's claim made by the said agent by accepting and receiving the benefit of such purchase, then in either case all representations and acts of the said agent occurring at the time of the purchase and with reference thereto are binding on the principal. *Lane v. Black*, 21 W. Va. 625.

c. Same.

The court instructs the jury that if they believe from

the evidence that A. was authorized to perform other duties for said B. and C., yet before the defendant can defeat the plaintiff's action they must show that A had authority to sell this particular ——— at the time they claim he did so, and if they fail to show that A. had such authority the jury must find for the plaintiff. *Rosendorff v. Poling*, 48 W. Va. 624.

d. Same—Agent's want of authority.

The court instructs the jury that if they believe from the evidence that A. had no authority to sell this particular ——— in question to D. from C., then they must find for the plaintiff. *Rosendorff v. Poling*, 48 W. Va. 624.

e. Same.

The court instructs the jury that if they do believe from the evidence that A. was authorized to perform other duties for B. and C. yet before the defendants can defeat the plaintiff's action, they must show that A. was in the employ of C. clothed with general authority to transact business for said C., including that of selling the ——— at the time D. claims to have purchased the ——— in controversy, and if defendants fail therein, then the jury must find for the plaintiffs. *Rosendorff v. Poling*, 48 W. Va. 624.

f. Employment of third party by agent—Ratification of acts of agent by principal.

The court instructs the jury that if they believe from the evidence that ——— was the agent of the defendant in charge at the well in controversy, and that said agent had placed ——— in charge of said well in his absence, and never returned to assume the management of said well, and never discharged ——— from the managing and looking after said well, and that said ——— was never discharged by the defendant from said management, and

that the defendant ratified the act of said agent, then, in that event, the acts, declarations and conduct of said ——— in managing and controlling said well would bind the defendant, and the jury should find for the plaintiff. *Coulter v. Blatchley*, 51 W. Va. 166.

g. False representations by agent—Concealment of facts by agent.

The court instructs the jury that if they believe from the evidence that the plaintiff was induced to sell his claim to the defendant by positive false representations of a material fact or facts, by the defendant or his agent, or the concealment of facts, which it was the duty of the defendant or his agent to communicate to him, then the question of plaintiff's ownership of the cattle for which the receipt or voucher was given can be considered by the jury in determining the issue in this case. *Lane v. Black*, 21 W. Va. 621.

h. Same.

The court instructs the jury that if they believe from the evidence that if the defendant, in treating for the purchase of the claim, or his agent at the time of the purchase thereof, made a positive false representation as to any material part constituting an inducement to the sale, or by the concealment of any such fact, in which plaintiff was misled and suffered damage, and in which plaintiff is presumed to have trusted to them or to either of them, and not to have relied on his own judgment, then the purchase of said claim was fraudulently obtained, and the jury must find for the plaintiff. *Lane v. Black*, 21 W. Va. 624.

CHAPTER 4.**ASSAULT AND BATTERY.**

- a. Regaining possession of property—Use of necessary force for.
- b. Same—Even though suffering or injury result from.
- c. Same—Unnecessary force.
- d. Same—Damages resulting from—How determined—Punitive damages.
- e. Persons charged with conspiracy may be convicted of assault and battery.

- a. **Regaining possession of property—Use of necessary force for.**

The court instructs the jury that if they believe from the evidence that the defendant was a merchant and legally had in his possession in his store the hat in question, and that the plaintiff came into said store and by inducing the defendant to believe that she, the plaintiff, would pay for said hat, obtained from the defendant the possession thereof, and that after obtaining possession of said hat, the plaintiff undertook to take the same out of said store without paying therefor, then the defendant had the legal right to pursue the plaintiff and retake the said hat, and that in so doing he had the right to use such force as was necessary for the purpose. *Stevens v. Friedman*, 58 W. Va. —.

- b. **Same—Even though suffering or injury result from.**

The Court instructs the jury that if they believe from the evidence that the plaintiff attempted to illegally take the hat in question from the possession of the defendant, or that she intentionally caused him to believe that she was in the act of so doing, and that acting under such belief

the said defendant pursued the plaintiff and recovered said hat from her by the use of so much force only as was necessary for the purpose, then they should find for the defendant, even though they may believe that the plaintiff was caused suffering or injury as the result of the use of such force. *Stevens v. Friedman*, 58 W. Va. —.

c. Same—Unnecessary force not to be used.

The Court instructs the jury that if they should believe from the evidence that defendant had the right to take the said hat from the possession of plaintiff, yet if they further believe that he used violence more than was necessary to be used in order to take possession of said hat from plaintiff, and that she was injured physically thereby and was caused to suffer physical pain thereby, then plaintiff is entitled to recover. *Stevens v. Friedman*, 58 W. Va. —.

d. Damages resulting from—How determined—Punitive damages.

The Court instructs the jury that if they believe from the evidence that the defendant committed an assault and battery upon the plaintiff, as alleged in the declaration, and that she is entitled to recover, then in determining the amount of damages, they are authorized to take into consideration any physical injury, if any, caused thereby, as well as any physical suffering, if any, caused thereby, and also such punitive or exemplary damages as they may judge proper and just in the premises, if they find from the evidence that said assault and battery was wanton or wilful. *Stevens v. Friedman*, 58 W. Va. —.

e. Person charged with conspiracy may be convicted of assault and battery.

The court instructs the jury that although they may find the prisoners not guilty of the offense charged in

the indictment, if they shall not be satisfied or have a reasonable doubt as to the existence of a conspiracy and combination to do the acts charged therein, yet you may find them guilty of assault and battery if you think that the evidence in this case shall warrant such verdict. *State v. Bingham*, 42 W. Va. 234.

CHAPTER 5.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

- a. Validity of assignment—Fraud in assignment.
- b. Same.
- c. Same—Recordation of deed of assignment.
- d. Sale of goods assigned for valuable consideration.
- e. Actual possession by purchaser, of goods assigned
—Statute of limitations.

- a. **Validity of assignment—Fraud in assignment—
Knowledge of assignee of fraudulent intent of assignor.**

The court instructs the jury that the assignment of — to —, (assignee), dated —, 18—, is not fraudulent on its face, and unless the jury believe from the evidence that —, when he executed this assignment, did so with intent to delay, hinder or defraud his creditors, and that this intent on his part was known to —, (assignee), when he, (the assignee), took possession of these goods, wares and merchandise, then the assignment is not fraudulent in fact so as to entitle the defendant, by reason thereof, to a verdict. *Kyle v. Harvey*, 25 W. Va. 732.

- b. **Same.**

The court instructs the jury that if they believe from

the evidence that the assignment of — to —, dated —, 18—, was made by — with intent to delay, hinder or defraud any of his creditors, and that when —, (assignee), took possession of these goods, he knew of this intent on the part of —, then the plaintiff cannot recover by reason of the execution of this assignment. *Kyle v. Harvey*, 25 W. Va. 733.

c. Same—Recordation of deed of assignment—Knowledge of purchaser of goods assigned of fraudulent assignment—Statute of limitations.

The court instructs the jury that if they believe from the evidence that the plaintiff bought the — in controversy knowing it was the same — conveyed by — to —, trustee, by a deed of assignment that was fraudulent and void, and that that deed was of record in this county where the purchase was made, then said plaintiff was bound to take notice of the fact that said deed conveyed no title to said — to said trustee, then they must find for the defendant, unless they further find that the plaintiff, or those under whom he purchased has had peaceable possession of said —, and claiming it as his own, for the period of five years. *Thornburg v. Bowen*, 37 W. Va. 540.

d. Sale of goods assigned for valuable consideration—Delivery and possession—Statute of limitations—Execution creditors.

The court instructs the jury that if they believe from the evidence that the — in controversy was sold to —, for a valuable consideration, and delivered the possession of same to said —; that afterwards the said — sold said — to the plaintiff for a valuable consideration, and delivered possession thereof to him; and if they further find that five years elapsed from the said sale of the — to the said first purchaser before the execution creditor

caused his execution to be levied thereon, then they should find that the plaintiff is entitled to said ——. *Thornburg v. Bowen*, 37 W. Va. 540.

**e. Actual possession by purchaser of goods assigned—
Statute of limitations.**

The court instructs the jury that if they believe from the evidence that the plaintiff and those under whom he holds, had had actual possession of the — in controversy for five years before the levy thereon by the execution creditors, then they should find for the plaintiff. *Thornburg v. Bowen*, 37 W. Va. 540.

CHAPTER 6.

ATTACHMENTS.

(Action on bond of justice of the peace.)

- a. Party leaving the state not entitled to exemption.
- b. Same—Change of residence—Intention of party.

a. Party leaving the state not entitled to exemption.

The court instructs the jury that if they believe from the evidence that the plaintiff left the state with the intention of changing his residence to —, (another state), and that while he was going out of this state pursuant to such intention, his property was attached and sold, as stated in the evidence, he was not entitled to claim, as against such levy, an exemption as a husband and parent residing in this state and in such case the jury should find for the defendant. *State v. Allen*, 48 W. Va. 155.

b. Change of residence—Intention of party.

The court instructs the jury that if they believe from the evidence that the plaintiff left the state with the in-

tention of removing his residence to any place outside of the same, he became a non-resident of the state as soon as he started on such removal, and to make the same. *State v. Allen*, 48 W. Va. 156.

CHAPTER 7.

ATTEMPT.

- a. **A person charged with attempting to commit a felony on one cannot be convicted of attempt on another.**

The court instructs the jury that if they acquit the prisoner of the felony charged in the indictment, they cannot convict of an attempt to commit the felony, unless they be satisfied beyond a reasonable doubt, that the prisoner attempted to shoot —, as charged in the indictment, and not some other person. *State v. Meadows*, 18 W. Va. 674.

CHAPTER 8.

AWARDS.

- a. What deemed an acceptance of.
- b. Repudiation of award.
- a. **What deemed an acceptance of an award.**
- The court instructs the jury that if they believe from the evidence that the defendant, on the — day of —, —, tendered to the plaintiff the sum of money specified in the award of the — day of —, —, as and for the ascertained price or value of the premises in controversy and the property in said award referred to, and also a draft of a deed for said property to be executed by the plaintiff to the defendant, and that afterwards, and before the — day of —, —, the said plaintiff with knowledge of such tender, formally refused to accept or comply with

the provisions of said award, and gave notice of such decision to the defendant, then the action of the defendant was a sufficient compliance with said award. *Gas Co. v. Wheeling*, 8 W. Va. 344.

b. Repudiation of award—Demand for and refusal of new appraisal.

The court instructs the jury that if after the appraisal made by ———, and ———, the plaintiff repudiated said appraisal and refused to accept the amount thereof claimed to be chargeable to the defendant, then the right afterwards to insist upon an appraisal to be made by two competent and disinterested appraisers, the plaintiff to select one and the defendant one, and the two so selected to name an umpire, as provided for in lines ——— to ———, both inclusive, of the policy, and if the jury find that the plaintiff, for any cause, refused to accept the result of said appraisal, and that after the knowledge of such refusal the defendant called upon the plaintiff by letter dated ———, ———, to submit to such appraisal as is provided to be made by said lines ——— to ———, both inclusive, of the policy, and if the jury believe from the evidence that the plaintiff has failed or refused to enter into an appraisal as demanded by said letter, then the plaintiff cannot recover. *Levy v. Insurance Co.*, 58 W. Va. ———.

CHAPTER 9.

BETTING AND GAMING.

a. Character of devices used.

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the slot machine described in the indictment is a gaming table,

and that the said machine is so constructed that it offers unequal chances to the player and exhibitor, and that the unequal chances are in favor of the exhibitor of said machine, then the said slot machine is a gaming table of like kind and character to A. B. C; E. O, table, faro bank and keno table. *State v. Gaughan*, 55 W. Va. 693.

CHAPTER 10.

BILLS OF LADING.

- a. Interest in bills of lading or its proceeds.
- b. Fraudulent transfer of—Purpose of—Knowledge of.
- c. Pledge of endorsed bill of lading—Warrant as against third parties.
- d. Draft drawn by seller in favor of bank—Passing of title.
- e. Charging draft to account of pledgor.
- f. Attachment of goods pledged.
- g. Right of property—Indebtedness of pledgor.
- h. Fraudulent transfer—Presumptions as to fraud.
- i. Purchase, assignment and delivery of bill of lading.

a. Interest in bill of lading, or its proceeds.

The court instructs the jury that the issue for them to decide is simply whether, at the time of the levy of plaintiff's attachment, the — bank of — had title to or lien on or any interest in the property mentioned in the bill of lading, marked "exhibit —" or its proceeds. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 41.

b. Fraudulent transfer—Purpose of—Knowledge of.

The court instructs the jury that before the plaintiffs could be entitled to have the transfer of the — mer-

chandise by the — company to the — bank of —, (the petitioner), treated as void because of fraud, they must satisfy the jury, by the evidence in the case, that the — company was actuated by a fraudulent purpose, or had knowledge of it at the time when the transfer was made. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 42.

c. Pledge of endorsed bill of lading—Effect of—Warrant as against third persons.

The court instructs the jury that the pledge of an endorsed bill of lading of goods in transit by land or water transfers the special property in the goods against third persons as well as against the pledgor himself. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 42.

d. Draft drawn by seller in favor of bank—Passing of title.

The court instructs the jury that a draft drawn by a seller against a buyer in favor of a bank, by which it is discounted or purchased, with the bill of lading attached, passes title to the goods and draft to the bank. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 43.

e. As to duty of charging draft to account of pledgor—Application of funds of pledgor in bank.

The court instructs the jury that the — bank of — was not, either when it received notice that the draft for \$— was not paid or when it received information that the merchandise had been attached by the plaintiff, obliged to charge the amount of said draft against the deposit account of the — company, the pledgors, or to apply the funds of the said company on deposit with the bank at the time of such notice or information to the payment of said draft; and the failure to make such charge or application is no defence to the claim of the bank in this case. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 44.

f. Attachment of goods pledged—Release of pledge.

The court instructs the jury that if they believe from the evidence that before the attachment of the plaintiff was levied on the — merchandise, the bill of lading for the same had been pledged to the — bank of —, and that the sum for which the pledge was given has not been paid to the bank, or the pledge released by it, their verdict must be for the petitioner. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 44.

g. Right of property—Indebtedness of pledgor.

The court instructs the jury that the issue in this case is simply one to determine the right of property to the merchandise, and not in any way to determine the indebtedness of the — company, the pledgors, to the plaintiff. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 44.

h. Fraudulent transfer—Presumption of fraud.

The court instructs the jury that the jury is not justified in presuming fraud from the mere suspicions which may be suggested to their minds, and can not be justified in holding that the bank was guilty of fraud, unless such fraud is clearly shown to the minds of the jury by the testimony. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 44.

i. Purchase, assignment and delivery of bill of lading.

The court instructs the jury that if they believe from the evidence that the — bank of — purchased the draft drawn by — & Co., on —, the plaintiff, and dated —, and that the assignment and delivery of the said bill of lading was made to said bank, their verdict must be for the bank. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 44.

CHAPTER 11.

BONDS.

- a. Assignment of without recourse.
- b. Same—Money due at time of assignment.
- c. Same—Effect of written agreement—Risk of collection—Parol evidence.

a. **Assignment of without recourse.**

The court instructs the jury that if a bond is assigned without recourse, it exempts the assignor from all liability by reason of the insolvency of the maker of the bond. *Houston v. McNeer*, 40 W. Va. 369.

b. **Same—Money due at time of assignment.**

The court instructs the jury that if a party takes a bond by assignment to him without recourse, and the amount of money called for by the bond is due at the time of the assignment, he is not entitled to recourse said bond because of any failure or inability on his part to make the money called for by the bond. *Houston v. McNeer*, 40 W. Va. 369.

c. **Same—Effect of written agreement—Risk of collection—Parol evidence.**

The court instructs that if they believe from the evidence that on the day of ———, 18—, plaintiff and defendant entered upon a negotiation for the sale and assignment of the bond from A to B, offered in evidence in this case, and that the result of said negotiation was the written agreement upon the back of said bond, signed by the plaintiff and defendant, then the legal effect of said written agreement is that if said bond was due and unpaid at the time of said agreement, the plaintiff took upon

himself the risk of collecting said bond and the terms of said written agreement cannot be changed or altered by parol evidence. *Houston v. McNeer*, 40 W. Va. 368.

CHAPTER 12.

BOOMS AND DAMS.

- a. Lease of lands for boom purposes.
 - b. Same—Knowledge of location and use of boom—Assumption of risks by lessor.
 - c. Same—Reasonable use and occupation of boom.
 - d. Same—Wrongful and negligent construction and use of boom.
 - e. Same—Lease for specified use.
 - f. Injury to owner of water mill by construction and use of boom.
 - g. Same—Statute of limitations as to action for injuries caused by.
 - h. Leasing by owner of boom to another—Effect of.
 - i. Charter rights of company—Authority under.
 - j. Criminal liability of boom owners for obstructing floatable streams by the construction of dams.
-
- a. Lease of land for boom purposes—Negligence in construction and use of booms.

The court instructs the jury that if they believe from the evidence that at the time of the injury complained of the plaintiff had leased to the defendant the river bank alleged to have been injured for boom-purposes, with contemplation of constructing and operating a boom, wherein the defendant's boom was constructed, then the plaintiff can not recover for damages resulting from the continuance and operation of said boom, unless they further find

that said injury was the result of negligence on the part of the defendant, in such construction and use. *Rogers v. Boom Co.*, 39 W. Va. 274.

b. Same—Knowledge of location and use of boom—Assumption of risks by lessor.

The court instructs the jury that the letting of the bank for the use of a boom, is, in the absence of a covenant to the contrary, an assumption by the lessor of all risks of damages or injuries to said banks resulting from a reasonable construction and use of said boom, and for such damages he can not, in such case, recover. *Rogers v. Boom Co.*, 39 W. Va. 274.

c. Same—Reasonable use and operation of boom.

The court instructs the jury that if they believe from the evidence that the plaintiff leased to the defendant the river banks alleged to have been injured, for the use of a boom, that the plaintiff assumed the risk of such damage as might result from the reasonable use of such boom; and the court further instructs the jury that if they further find that the defendant constructed, used and operated its boom in a reasonable manner they must find for the defendant. *Rogers v. Boom Co.*, 39 W. Va. 274.

d. Same—Wrongful and negligent construction and use of boom—Burden of proof.

The court instructs the jury that if they believe from the evidence that the plaintiff leased to the defendant the river bank, the alleged injury to which is the cause of this suit, for boom purposes, he assumed the risk of all ordinary wear and tear resulting to said bank from the reasonable and proper construction and use of said boom; and that, unless they find from the evidence that the said boom was constructed and used in a wrongful, improper or negligent manner, they must find for the defendant;

and further, that the burden is on the plaintiff to prove that said boom was constructed or operated in a wrongful, negligent, or improper manner. *Rogers v. Boom Co.*, 39 W. V. 275.

e. Lease for specified use.—Express covenants—Risks assumed by lessor.

The court instructs the jury that any person leasing property for a specified use, in the absence of an express covenant to the contrary, assumes the risk of the ordinary wear and tear of such property resulting from such use, and the said lessee is not liable for damages to said property resulting from such use, unless caused by his wrongful or negligent act. *Rogers v. Boom Co.*, 39 W. Va. 275.

f. Injury to owner of water mill by construction and use of boom.

The court instructs the jury that if they find from the evidence that the plaintiff was, at the time the boom of the defendant was put in — River, the owner of the banks and shores at the Upper Falls of — River, and if they further find that he has been ever since such owner of the banks and shores at said point, then the plaintiff is entitled to the use of the natural flow of said river opposite his lands, for the purpose of running and operating a mill, and has the right to the full natural flow of said stream at that point, measured from the head of the fall to the foot of the fall, perpendicularly, according to the natural flow of the water in the river; and if the jury further find that the plaintiff, and those under whom he claims title to said banks and shores, have maintained and used according to law a dam on the crest of said falls for more than twenty years next preceding this suit for the purpose of increasing the said falls at that point, then the plaintiff is entitled to the use of said natural fall and dam, according to the natural flow of the river over the

same; and if the jury further find from the evidence that the defendant's boom obstructed the natural flow of said river below said fall and dam, and that said obstructing of said river caused sand or sediment to settle in the river below said fall, and that by reason of such settling of sand or sediment the natural bed of said river below said fall was raised, and that the said fall was thereby reduced or lowered, and that the power of the water to run the said mill was thereby lessened, and that by reason of the lessening of said power the plaintiff was unable to run his mill during any part of the time within the five years next preceding the institution of this suit, then the jury should find for the plaintiff. *Pickens v. Boom Co.*, 58 W. Va. —.

g. Same—Statute of limitations as to action for injuries caused by.

The court instructs the jury that if the defendant's boom has injured the plaintiff, as alleged in his declaration, the statute of limitations begins to run from the time that said injury occurred, and not from the date of the erection or completion of said boom. *Pickens v. Boom Co.*, 58 W. Va. —.

h. Same—Leasing by owner of boom to another—Effect of.

The court instructs the jury that if they believe from the evidence that the defendant, the — River Boom and Timber Company, secured a charter for the location of a boom in — River, and constructed the said boom so as to make it large enough to catch logs, and afterwards leased the same to the —River Boom and Driving company for the purpose of operating the said boom for catching logs and timber, and if the jury further find that since the leasing of said boom to the said lessee, The — River Boom and Driving Company has used and operated the

said boom, and additions which the latter has built there-to, and if the jury further find that the location, building and operation of the said boom has caused the injury to plaintiff, mentioned in his declaration, then the defendant can not escape liability for such injury, if any, which has occurred within the five years next preceding the institution of this suit, on account of having made the lease. *Pickens v. Boom Co.*, 58 W. Va. —.

i. Charter rights of company—Authority under.

The court instructs the jury that the rights of the defendant company, under its charter, do not authorize it to locate a boom in such close proximity to plaintiff's mill, without plaintiff's consent, so as to impede the flow of the water and cause sand or other sediment to settle below his fall and dam; and if the jury find from the evidence that, within five years next preceding the institution of this suit, the plaintiff's mill has been prevented from running by reason of the lessening of his water power and that such lessening of his water power was caused by reason of the impeding or backing of the water in — River on account of the location or operation of said boom, and the settling of sand or sediment below the plaintiff's said water power, caused thereby, then the jury should find for the plaintiff. *Pickens v. Boom Co.*, 58 W. Va. —.

j. Criminal liability of boom owner for obstructing floatable streams by the construction of dams.

The court instructs the jury that it is a question for the jury to determine from the evidence whether — river, at the point at which the dam complained of is located, is floatable; and if the jury believe from the evidence that said river is capable of being used to float rafts, boats and other timber in time of rises only, then, before they can find the defendant guilty, it must be proven to the jury

by the evidence, beyond all reasonable doubt, that the dam complained of was so constructed and maintained as not to permit boats, rafts, and other timber to pass without unavoidable delay, at the times of such rises as made the said river so floatable. *State v. Boom Co.*, 41 W. Va. 800.

CHAPTER 13.

BURGLARY.

- a. Breaking and entering—Intent.
 - b. What constitutes breaking and entering.
 - c. Time of entering—Intent presumed.
 - d. Same—Value of goods.
 - e. Ownership of property—Belief of defendant as to.
 - f. Same—Failure to establish criminal intent.
 - g. Larceny openly committed.
 - h. What constitutes a dwelling house.
 - i. Larceny of goods when no burglary committed.
- a. **Breaking and entering—Intent to commit burglary when no larceny committed.**

The court instructs the jury that if they believe from the evidence in this case beyond a reasonable doubt that the prisoner broke and entered the store-house of —, as charged in the indictment, with the intent of committing larceny therein, they should find him guilty, though he may not have been guilty of any larceny therein. *State v. Shores*, 31 W. Va. 504.

- b. **What constitutes breaking and entering.**

The court instructs the jury that there is no necessity in this case to show an absolute separation of the particles of wood, iron, &c., of the store-house or dwelling-house of

— referred to in the indictment or of the door thereof, in order to make the breaking and entering thereof by the prisoner burglary. But if they believe from the evidence, beyond a reasonable doubt, that the prisoner raised the latch or pushed open the door of said dwelling-house or store-house, which was closed, and entered the same with the intent to commit larceny therein at the time and in the manner charged in the indictment, then the jury should find him guilty. *State v. Shores*, 31 W. Va. 504.

c. Time of entering—Intent presumed.

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the prisoner broke and entered the store-house of — as charged in the indictment in the night time, and was guilty of larceny therein, then he is presumed to have broken and entered said store-house with the intention of committing such larceny, and unless this presumption is negated to the satisfaction of the jury, then the jury should find said prisoner guilty. *State v. Shores*, 31 W. Va. 504.

d. Same—Value of goods.

The court instructs the jury that if they believe from the evidence in this case beyond a reasonable doubt that the prisoner, on the night of the — day of —, 18—, broke and entered the store-house of — referred to in the indictment with the intent of committing larceny, and did commit larceny therein of the property of said — of any value whatever, then they should find the prisoner guilty. *State v. Shores*, 31 W. Va. 504.

e. Ownership of property—Belief of defendant as to.

The court instructs the jury that if they are satisfied from the evidence, and that beyond reasonable doubt, that the prisoner, acting alone or in concert with — and —, who stand jointly indicted with him, broke and en-

tered the dwelling or store-house mentioned in the indictment in this case on the — day of —, 18—, in the night time, and they should further believe from the evidence that he so broke and entered said house for the purpose only of taking or drinking cider therein that he believed in good faith to belong to him, then they should find him not guilty, although the jury may believe from the evidence that the cider so intended to be taken by him belonged to some one else. *State v. Shores*, 31 W. Va. 504.

f. Same—Failure to establish criminal intent.

The court instructs the jury that if they believe from the evidence in the case that the prisoner, together with others named in the indictment, broke and entered the store-house of — for the purpose of taking therefrom goods or chattels that they honestly believed they had a right to take, then the criminal intent to commit larceny is not established, then they should find the prisoner not guilty. *State v. Shores*, 31 W. Va. 504.

g. Larceny openly committed.

The court instructs the jury that if they believe from the evidence that on the night of the — day of —, 18—, — was keeping a store in the dwelling-house or store-house mentioned in the indictment, and that among other things kept for sale in said store was cider, and that it was the custom of said — to deliver cider to his customers in glasses on the store counter and to make no demand for pay for the cider sold to his customers until they had drunk the same, and if they are further satisfied from the evidence that at the time aforesaid and during the usual business hours of said —'s store, the prisoner and — and — and — being in said store, the prisoner ordered cider for them, and that the cider was poured out from them into glasses and placed on the store counter,

and that for some reason the prisoner, said — and — went out of the said house and in a few minutes returned and found said store-house or dwelling-house door locked, and that it was still the usual business hours of the store and the said store-house was still lighted as in business hours, and the prisoner then and there alone, or in concert with said —, broke and entered the said store-house, and that the prisoner then and there appropriated to his own use and drank a part or all of the cider so poured out for him, and they further believe from the evidence that the prisoner so appropriated and drank said cider openly and in the presence of said — and one of the servants of said —, who then worked in said house and was well known to said —, and that one — was also present when said cider was so taken and drunk, and that said —, — and said servant were all acquainted with said —, and that the said —, — and said servant were in no way guilty in the taking of said cider, then the jury should not on the account of these circumstances treat such taking or drinking of said cider as a larceny thereof. *State v. Shores*, 31 W. Va. 504.

h. What constitutes a dwelling house.

The court instructs the jury that if they believe from the evidence that — held the possession of said house at the time alleged in the indictment, and that he used and occupied said house as a dwelling, then, in contemplation of law, said house was the dwelling house of said —, although he may have absented himself therefrom for several months, and although he may have had another dwelling house during the same time. *State v. Williams*, 40 W. Va. 269.

i. Larceny of goods when no burglary committed.

The court instructs the jury that although they should believe from the evidence that no dwelling house was

broken or entered, as alleged in the indictment, yet if they believe from the evidence that the defendant stole and carried away any of the goods of —, as alleged in the indictment, then they should find him guilty of the larceny of said goods. *State v. Williams*, 40 W. Va. 269.

CHAPTER 14.

CARRIERS.

- A. CARRIERS OF FREIGHT.
- B. CARRIERS OF LIVE STOCK.
- C. CARRIERS OF PASSENGERS.
- D. EQUIPMENTS.
- E. CONTRIBUTORY NEGLIGENCE.

A. CARRIERS OF FREIGHT.

- a. Special contracts—Shipments under—Recovery under.
- b. Same—Bills of lading as evidence of.
- c. Same—Ordinary care—Unforeseen accidents.
- d. Ordinary care—No liability when exercised.
- e. Delivery of and refusal to receive goods.
- f. Freight shipped by river—Carriers not insurers of.
- g. Same—Burden of proof.
- h. Same.
- i. Right of action—How defeated—Exceptions as to.

a. Special contracts—Shipment under—Recovery under.

The court instructs the jury that if they believe from the evidence that the oil referred to in the declaration in this suit was contracted to be shipped and transported from, and to the places mentioned in the declaration, un-

der special contracts, the plaintiff can only recover under such special contracts, and the terms and conditions of the same. *Rathbone v. Railroad Co.*, 1 W. Va. 92.

b. Same—Bills of lading—Evidence of.

The court instructs the jury that bills of lading delivered by the defendant (the R. R. Co.); of his agent to the plaintiff and given in evidence by him to the jury, are sufficient evidence of special contracts, and the terms under which the oil in said bills of lading respectively mentioned, were to be transported by the defendant. *Rathbone v. Railroad Co.*, 1 W. Va. 92.

c. Same—Ordinary care—Unforseen accidents.

The court instructs the jury that if they believe from the evidence that said oil alleged to have been lost and destroyed, was shipped and transported under special contracts, and was so lost and destroyed, and that in transporting the same, the defendant, its agents and servants exercised such care as a prudent man would, as to his own goods, to protect said oil from accidents in its transportation, and that said fire was the result of an unforeseen accident, which could not have been prevented by ordinary diligence, then the plaintiff ought not to recover in this suit, for the oil so lost by fire. *Rathbone v. Railroad Co.* 1. W. Va. 93.

d. Ordinary care—No liability when exercised.

The court instructs the jury that if they believe from the evidence, the said oil alleged to have been lost and destroyed and not delivered in —, referred to in the evidence in this suit, was lost by fire—and the defendant, its agents and servants, exercised ordinary care and diligence in transporting the same, the defendant is not liable. *Rathbone v. Railroad Co.*, 1 W. Va. 92.

e. Delivery and refusal to receive goods shipped.

The court instructs the jury that if they find from the evidence that the defendant, or any one else offered to deliver to the consignees, at their place of business in —, the goods shipped by — on the — day of —, from —, and the said — refused to receive the same, then they should find for the defendant. *Ryland v. Railway Co.*, 55 W. Va. 183.

f. Carrier not insurer of freight shipped by river—Carelessness and negligence—Due diligence.

The court instructs the jury that — is not an insurer of the freight shipped on the — river. In this suit it cannot be made liable, unless the jury are satisfied that it was guilty of carelessness and negligence in allowing the — to remain an unreasonable time in the — chute, upon which the barge carrying the plaintiff's salt was sunk; or that by due diligence and care on the part of itself or its agent it could have discovered and removed the same. *Tompkins v. Kanawha Board*, 21 W. Va. 230.

g. Same—Burden of proof.

The court instructs the jury that if they believe from the evidence that — chute was obstructed by a — lying therein, by reason of which the barge was sunk, and plaintiff's salt was lost, then upon proof of such obstruction the burden of proof is on the defendant to show that it used due diligence to ascertain and remove said obstruction before said loss. *Tompkins v. Kanawha Board*, 21 W. Va. 231.

h. Same.

The court instructs the jury that the burden of proof in this suit is on the plaintiff to show that there was negligence and carelessness on the part of the defendant, and unless he so proves, the jury must find for the defendant; but the question of negligence or carelessness is

one for the consideration and decision of the jury upon all the evidence before them and upon the duties imposed upon the defendant by law; and any want of diligence in not performing such duty is negligence and carelessness on its part. *Tompkins v. Kanawha Board*, 21 W. Va. 231.

i. Right of action—How defeated—Exception as to.

The court instructs the jury that if they believe from the evidence that if the loss to the plaintiff occurred in a material part by the carelessness and want of skill of those having charge of the steamer—and barge, which carried plaintiff's salt, the plaintiff cannot recover in this action; but that such carelessness or want of skill on the part of those having charge of the steamer—and barge must have been to such an extent, as to have contributed to the loss, which ordinary diligence might have avoided. *Tompkins v. Kanawha Board*, 21 W. Va. 230.

B. CARRIERS OF LIVE STOCK.

- a. Special contracts—Exemption from liability under—Negligence.
 - b. Same—When unlawful.
 - c. Same—Delay in shipment under.
 - d. Same—Injuries resulting from negligence.
 - e. Same—Modification of—Reasonable and just modifications.
 - f. Same—Injuries resulting from heat of weather.
 - g. Same.
 - h. Means of transportation—Acceptance of by shipper.
 - i. Same—Consideration of on question of liability.
 - j. Delay in shipment.
- a. **Special contracts—Exemption from liability under, unless negligence be shown.**

The court instructs the jury that if they believe from

the evidence that the contract to carry safely the ——— alleged in the plaintiff's declaration, was subject to the condition that the defendant, (R. R. Co.) should not be liable for damages or injury to the live stock mentioned in the declaration, whilst in the cars of the defendant, or for delay in the carriage of said stock, or escape thereof from the cars, except such as might arise from the gross negligence of the agents or officers of the defendant, acting in the discharge of their duties, then they should find for the defendant. *Skeels v. Railroad Co.*, 3 W. Va. 558.

b. Same—Unlawful, when seeks to exempt carrier from responsibility for negligence under.

The court instructs the jury that the defendant in this case could not lawfully stipulate by special contract or otherwise for exemption from responsibility for the negligence of itself or its servants. *Maslin v. Railroad Co.*, 14 W. Va. 184.

c. Same—Delay in shipment.

The court instructs the jury that the defendant could not lawfully stipulate by special contract or otherwise for exemption from responsibility for the negligence of itself or its servants; and if the jury believe from the evidence that there was an unreasonable delay in transporting the cattle referred to in this case from ——— station to the city of ——— by the defendant, and that such delay was caused by the negligence of the defendant or its servants, they should find for the plaintiff. *Bosley v. Railroad Co.*, 54 W. Va. 571.

d. Same—Injury resulting from negligence.

The court instructs the jury that although they may believe from the evidence that the paper writing dated —, 18—, entitled "stock contract" was fairly executed, yet if they believe from the evidence, that the said cattle in

their transportation by the defendant from — to — sustained loss and injury, and that said loss and injury resulted from the negligence of the defendant or its servants, then they must find for the plaintiff. *Maslin v. Railroad Co.*, 14 W. Va. 184.

e. Same—Modification of—Carrier exempt under if such modification be just and reasonable.

The court instructs the jury that if they believe from the evidence that the cattle mentioned in the declaration were recived and taken by the defendant at —, to be carried and delivered to —, at —, by virtue of and upon the terms and stipulations of the contract of shipment of the — day of —, 18—, then the defendant was not liable as a common carrier for the safe and careful carriage and delivery of the same, so far as such liability was modified by any special contract limiting the same, provided such modifications are just and reasonable in law. *Maslin v. Railroad Co.*, 14 W. Va. 186.

f. Same—No liability under for injuries resulting from heat of weather, unless negligence be shown.

The court instructs the jury that if they believe from the evidence that the — head of cattle mentioned and described in the declaration, and delivered by the plaintiff to the defendant, at —, to be transported to —, were so delivered by the plaintiff, and so received by the defendant, to be transported upon the stipulations, conditions and understandings expressed in the agreement in writing between the plaintiff and defendant, dated the — day of —, 18—, and if the jury further believe that the plaintiff suffered no other damage from the undertaking of the defendant in relation to the said cattle than what resulted from heat of the weather, then they must find for the defendant, unless they further find that such injury might have been prevented by the exercise by de-

fendant's servants of such care and diligence as was practicable under the circumstance. *Maslin v. Railroad Co.*, 14 W. Va. 186.

g. Same.

The court instructs the jury that if they believe from the evidence that the cattle mentioned in the declaration were taken and received by the defendant at —, to be carried and delivered to —, at —, upon the terms and stipulations of the contract of — of —, 18—, the defendant was not liable to the plaintiff for loss and injury to the said cattle which resulted from heat, unless they should further find that defendant or its servants were guilty of negligence in not employing such means to alleviate such consequences as were reasonable and practicable under the circumstances. *Maslin v. Railroad Co.*, 14 W. Va. 187.

h. Carrier not required to furnish means of transportation other than accepted by shipper.

The court instructs the jury that if they believe from the evidence that the plaintiff put his cattle upon the slow stock train of the defendant to be carried upon it to —, and paid the hire therefor there, then the plaintiff cannot, under the pleadings in this case, recover any damages because of any failure of the company to furnish cars for the shipment of said cattle at an earlier or different time upon the request of the plaintiff. *Maslin v. Railroad Co.*, 14 W. Va. 184.

i. Means of transportation not to be considered on question of liability.

The court instructs the jury that the jury cannot consider, on the question of liability of the defendant, the fact that the cattle were not shipped on a different train,

or were shipped on the train on which they were carried. *Maslin v. Railroad Co.*, 14 W. Va. 185.

j. Delay in shipping—Assessment of damages caused by.

The court instructs the jury that if they believe from the evidence that there was such unreasonable delay on the part of the defendant or its servants in transporting said cattle to the city of —, they should find for the plaintiff; and if they further believe from the evidence that the plaintiff was damaged by said delay, in assessing such damages they should take into consideration all damages naturally and proximately resulting from such delay. *Bosley v. Railroad Co.*, 54 W. Va. 571.

C. CARRIERS OF PASSENGERS.

1. DEGREE OF CARE REQUIRED AND LIABILITY OF CARRIERS IN GENERAL.

- a. Duty to exercise greatest care and diligence.
- b. Management of trains—Care required in.
- c. Liability of carrier for wrongful act of agent.
- d. Liability of carrier for negligence of agents.
- e. Liability of carrier for negligence of contractors.
- f. Excessive fares—Schedule of rates.
- g. Acts of conductors in collecting excessive fares.

a. Duty to exercise greatest care and diligence.

The court instructs the jury that the law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence and compels them to repel, by satisfactory proofs, every imputation of such negligence. When carriers undertake to convey passengers by the powerful, but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any neglect or default in such cases makes such carriers liable in damages under the statute. *Searles v. Railway Co.*, 32 W. Va. 374.

b. Management of trains—Care required in.

The court instructs the jury that a railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair and care of the track and bridges and all other arrangements necessary to the safety of passengers. *Searles v. Railway Co.*, 32 W. Va. 374.

c. Liability of carrier for wrongful acts of agent—Arrest of passenger while on train.

The court instructs the jury that if they believe from the evidence that the plaintiff, without just cause, was arrested after he became a passenger on one of the defendant's trains, and during the time that he was on such train, either by the conductor in charge of said train, or by the policeman —, by order of said conductor, that the act of the conductor, or of the said policeman acting under the orders of the said conductor, was the act of the defendant. *Gillingham v. Railroad Co.*, 35 W. Va. 602.

d. Liability of carrier for negligence of agents.

The court instructs the jury that if they believe from the evidence that the plaintiff was injured by being struck by a stone standing in dangerous proximity to the defendant's railroad track, and that the position of said stone was known to the defendant, or the agents of said defendant, or might have been known to them by the use of ordinary care and diligence, and there was such negligence of such agents in failing to remove said stone, or in failing to use care and diligence in ascertaining whether said stone was in dangerous proximity to the track of said defendant, such negligence of such agents was the negligence of the defendant. *Carrico v. Railway Co.*, 39 W. Va. 95.

e. Same—Contractors.

The court instructs the jury that if they believe from

the evidence that the defendant company, while using its track for the carriage of passengers, engaged in a work to be done on its road, or in immediate proximity to its track, negligence in the performance of which would, in the estimation and opinion of a reasonable, cautious person, involve the hazard of obstruction to the passage of cars, and an accident to a passenger is caused by an obstruction arising from negligence in the performance of the work, it is no defence for said railroad company to show that it had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of one of his employes. *Carrico v. Railway Co.*, 39 W. Va. 103.

f. Excessive fares—Schedule of rates—Rules of company—Violation of.

The court instructs the jury that if they believe from the evidence that the conductor collected — cents, and the company had a schedule of rates for the government of the conductors in collecting fares from passengers, and a duplicate of it was furnished to the conductor, and it was against the rules of the company for the conductor to charge the plaintiff more than the rates fixed by said schedule, and if said rates were not more than the law allowed, then the jury must find for the defendant. *Hall v. Railroad Co.*, 44 W. Va. 41.

g. Same—Act of conductor in collection of excessive fares.

The court instructs the jury that before they can find for the plaintiff, they must believe from the evidence, to the exclusion of every reasonable doubt, that the company charged the plaintiff more than was allowed by law, and that notwithstanding the conductor charged — cents, which was more than the law allowed, if the jury believe

that the rules of the company did not allow the conductor to charge the plaintiff more than was allowed by law, and that he acted in violation of the rules of the company, the act of the conductor was not the act of the company. *Hall v. Railroad Co.*, 44 W. Va. 41.

2. THE RELATION OF CARRIER AND PASSENGERS.

- a. What necessary to become a passenger—Intention of party as to—Party coming to board train—When purchase of ticket not necessary.
 - b. Fraud in procurement of ticket.
- a. **What necessary to become a passenger—Intention of party as to—Party coming to depot to board train—Coming within a reasonable time before departure of train—When purchase of ticket not necessary.**

The court instructs the jury that to become a passenger and entitled to protection as such it is not necessary that a person shall have entered a train or paid his fare, but he is a passenger as soon as he becomes within the control of the carrier at the station, through any of the usual approaches, with the intent to become a passenger. And the jury are further instructed that if they believe from the evidence that the plaintiff, on the — day of —, 18—, went to the defendant's depot at the town of —, by one of the usual routes thereto, for the purpose and with the intention of taking the next train, and stepped upon the platform of said depot with the intention and purpose of becoming such passenger, the plaintiff then became, in contemplation of law, a passenger of the defendant, provided she came to said depot and platform within a reasonable time before the time for the departure of said train, whether or not she had purchased a ticket from the defendant or its agent. *Barker v. Railroad Co.*, 51 W. Va. 430.

b. Fraud in procurement of ticket—Right of carrier to rescind contract for.

The court instructs the jury that the possession of a railroad ticket is not conclusive evidence of the right of the holder to transportation; that the circumstances may be such that it will be a proper subject of investigation whether the holder of the ticket has not got possession of it by fraud, and the jury are therefore further instructed that if they believe from the evidence in this case that the ticket was obtained by —, editor of the —, from the defendant, by the representation to the said railroad company that —, the plaintiff, was in the employ of the said —, and a member of the staff of the —, and if they further believe that this representation was false, and if they further believe that by means of such false representation the name of —, the plaintiff, was inserted in said ticket, that in such case the jury may consider such false representations to find whether such ticket was fraudulently obtained by —, and if they believe that such ticket was fraudulently obtained from the defendant, then in such case the defendant had a right, upon the discovery of such fraud, to rescind the contract and take up the ticket. *Moore v. Railroad Co.*, 41 W. Va. 175.

3. ARREST OF PASSENGERS.

a. When railroad company not liable for acts of conductor—Scope of authority of conductor.

b. Same.

c. Same.

d. Arrest of passenger armed with dangerous weapons.

a. When carrier not liable for acts of conductor—Scope of authority of conductors.

The court instructs the jury that the plaintiff can not recover in this case unless the acts done by the conductor in causing the arrest of the plaintiff were within the scope

of his employment by the defendant railroad company; and such acts, to be within the scope of his employment, must be such as he would be usually and naturally called upon to do while discharging his duties as a railroad conductor in and about the business of the defendant railroad company. *Gillingham v. Railroad Co.*, 35 W. Va. 603.

b. Same.

The court instructs the jury that it is not sufficient that the acts complained of were done during the time of the conductor's employment by the railroad company, or at the place where his duties called him to be. There must be something more, something which he was authorized by the defendant company to do, or which he did do while acting as such conductor, in the scope of his duties and employment. *Gillingham v. Railroad Co.*, 35 W. Va. 603.

c. Same.

The court instructs the jury that unless the act done by the conductor in causing the arrest of the plaintiff was authorized by the railroad company, or was properly and legitimately within the scope of his employment, you must find for the defendant. *Gillingham v. Railroad Co.*, 35 W. Va. 603.

d. Arrest of passenger armed with a dangerous weapon.

The court instructs the jury that if they believe from the evidence that the plaintiff, while armed with dangerous or unlawful weapons, was on the train of the defendant, within the corporate limits of —, and it became known to the police of that town that he was so unlawfully armed, the police had the right to arrest him on the cars and take him therefrom, and the defendant, the — railroad company, would not be liable for such arrest. *Claiborne v. Railway Co.*, 46 W. Va. 369.

4 EJECTION OF PASSENGERS.

- a. Passenger holding ticket fraudulently procured.
 - b. Same—Knowledge of passenger that ticket was void—Duty of passenger to enquire as to validity of ticket.
 - c. Same—With whom power to eject rests.
 - e. Unauthorized assault on passenger—Disorderly conduct of passenger.
 - f. Same—Special instructions of carrier as to movement of trains—Acts of conductor when within his scope of duty and power.
- a. **Passenger holding fraudulent ticket—Right of carrier to eject.**

The court instructs the jury that if the jury believe from the evidence that the ticket was issued in consideration of the publication by —, editor of —, of the time card and local notices in the —, of the defendant for the year —, and if they further believe from the evidence that the plaintiff had knowledge of the said terms upon which said ticket was issued and delivered to the said —, and if they further believe from the evidence that there was no other consideration paid for said ticket, and if they further believe from the evidence that the said ticket was issued in the name of the plaintiff upon the representation made by —, editor of the —, that the said plaintiff was on the staff of the — at the time the said ticket was delivered to the said — and received by the plaintiff, and if they further believe from the evidence that the representations made by the said —, editor of the —, that the said plaintiff was on the staff of the said —, were false, and that those false representations induced the railroad company to insert the name of said plaintiff in said ticket, then, in such case, upon the discovery by the defendant of such misrepresentations, said defendant had the right to cancel said ticket

and take the same from the possession of the plaintiff, and had the further right to demand from the said plaintiff the amount necessary to transport him from — to —; and upon the failure upon the part of the plaintiff to pay the conductor the amount of fare necessary for such transportation, the conductor had a right to remove said plaintiff from its car, using only such force as was necessary to accomplish this purpose. *Moore v. Railroad Co.*, 41 W. Va. 176.

**b. Same—Knowledge of passenger that ticket was void
—Duty of passenger to enquire as to validity of ticket.**

The court instructs the jury that if they believe from the evidence that before the day that the plaintiff was removed from defendant's car by the conductor, the said conductor notified the plaintiff that he would not receive said ticket for his fare on said railroad, and if they further believe that the said conductor notified the plaintiff that he had better send said ticket to the general office of the railroad company, or call there in person and make enquiry as to what was wrong with said ticket, and if they further believe from the evidence that before said plaintiff took passage on the train of the defendant from — to —, he had an opportunity offered him of making an investigation as to the validity of his ticket, and failed, neglected, or refused to do so, then in such case the plaintiff was guilty of negligence in not making the necessary enquiry as to the validity of said ticket; and the jury should take into consideration such failure on the part of the plaintiff, in arriving at their verdict in this case. *Moore v. Railroad Co.*, 41 W. Va. 177.

c. Same.

The court instructs the jury that if they believe from

the evidence that the plaintiff had notice that the railroad company would not receive said ticket for his fare for travel on its railroad, a sufficient length of time before he took passage on its train, the day he was removed therefrom, to have enabled him to have investigated said ticket, and to enquire into the reasons of this refusal, at the general office of said defendant, and if they further believe from the evidence that the said plaintiff failed to make such enquiries as to the validity of his ticket, then he was guilty of negligence in going upon the defendant's train without necessary means to pay his fare as a passenger, and after having notice that his ticket would not be accepted; and the jury should consider such neglect on the part of the plaintiff, in arriving at their verdict in this case. *Moore v. Railroad Co.*, 41 W. Va. 178.

d. Same—Power to eject—With whom rests.

The court instructs the jury that when a railroad train is running on the main line of its road in the course of its regular run, and is manned by a conductor, engineer, fireman and brakeman, like the one shown in the evidence here, in the absence of proof to the contrary, all power to eject rests impliedly, under the law, with the conductor, and such power must be exercised either by such conductor or some one else acting under or by his order or command. *Landers v. Railroad Co.*, 46 W. Va. 498.

e. Unauthorized assault on passenger—Disorderly conduct of passenger—Preponderance of evidence.

The court instructs the jury that if they believe from a preponderance of the evidence that the plaintiff, at the time the injury complained of, while riding as a passenger on the defendant's train, was cursing or behaving in a riotous or disorderly manner, then it was the privilege of the defendant to put him off such train, and the law

gave the conductor and trainmen in charge of such train the right to use such force as was necessary for that purpose; but no such conduct on the part of the plaintiff would license or authorize the conductor on such train to unnecessarily assault and beat the plaintiff. *Smith v. Railway Co.*, 48 W. Va. 70.

f. Same—Special instructions of company as to movement of trains — Acts of conductor when within scope of his duty and power.

The court instructs the jury that the special instruction offered in evidence, reading as follows: "Agents and yard masters will have charge of and direct movements of all trains and trainmen in ———, ———, ——— and ——— yards," does not take away the power and authority implied, possessed under the law by the conductor of a through freight train to protect and care for his own train, while the same may have been on the main line of the railroad; and if the jury believe from the evidence that the said train was running on the main track, going on its regular run ———, with the conductor and the rest of the crew aboard, after the yard master had signalled the conductor to leave, then such conductor, after his train had started and was moving on the main line on its through run (although it may have been at the time within the yard limits of the railroad company), had the authority to order a trespasser from his train; and if the jury believe from the evidence that said conductor ordered the plaintiff ejected from his said train under such circumstances, then such conductor was acting in the line of his duty, and within the scope of his duty, and within the scope of his implied powers, in the absence of evidence conferring such authority upon some one else then on the said train. *Landers v. Railroad Co.*, 46 W. Va.

D. EQUIPMENTS.

a. Care required in the construction of roads and management of trains.

The court instructs the jury that a railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair and care of the track and bridges and all other necessary arrangements necessary to the safety of passengers. *Scarles v. Railroad Co.*, 32 W. Va. 374.

E. CONTRIBUTORY NEGLIGENCE.

- a. Obstructions in dangerous proximity to railroad tracks.
- b. Places of danger—Duty of passengers occupying.
- c. Exposure by passengers to danger.
- d. Same—In violation of reasonable regulations of carrier.
- e. Same—Heedless exposure to danger.
- f. Same—When increased exposure does not prevent recovery for injury.
- g. Same—Knowledge of carrier of danger to which passenger exposed.
- h. Same—Care and diligence required of carrier.
- i. Intoxication of passenger.
- j. Restraint upon passengers by carriers.
- k. Preponderance of evidence when contributory negligence relied on.
- l. Risks assumed by passenger—Unavoidable accidents.
- m. Same—Negligence of carrier.
- n. Concurrent negligence.
- o. Same—Apportionment of negligence.

a. Obstructions in dangerous proximity to railroad track.

The court instructs the jury that if they believe from the evidence that the defendant placed or allowed to be placed by its railroad track ——— in such dangerous proximity to said track as to prevent the passage of a passenger car on said track without striking or scraping said car, and in consequence thereof the plaintiff was injured as is charged in the declaration, without fault on his part contributing to said injury, such act of the defendant is negligence in law. *Carrico v. Railway Co.*, 39 W. Va. 92.

b. Places of danger—Duty of passenger occupying to obey request of carrier.

The court instructs the jury that it is the duty of a passenger unnecessarily riding on the platform of a car in motion to go into the car when requested by the conductor or others in charge of the train, if there be only standing room in the car, and if the jury believe from the evidence that the plaintiff's failure to obey such request contributed to his injury, they should find for the defendant. *Fisher v. Railroad Co.*, 42 W. Va. 195.

c. Exposure by passenger to danger.

The court instructs the jury that if they believe from the evidence that the plaintiff's arm was resting on the window-sill of the passenger car, the placing of his arm there was not negligence on the part of the plaintiff, provided, when resting upon said sill, it did not protrude beyond the window of the car. *Carrico v. Railway Co.*, 39 W. Va. 96.

d. Same—When in violation of reasonable regulation of carrier.

The court instructs the jury that a regulation of a rail-

road company which forbids passengers to stand upon the platform while the car is in motion is a reasonable and proper rule; and if a passenger, in violation of such regulation, unnecessarily exposes himself, he does so at his own peril. *Fisher v. Railroad Co.*, 42 W. Va. 193.

e. Same—Heedless exposure to danger—Duty of carrier.

The court instructs the jury that if they believe from the evidence that the plaintiff was riding on the platform of the defendant's car in such a state of intoxication as to be careless and heedless of the danger to which he was exposed, and the conductor was aware of his position and exposure to danger, it was the duty of said conductor to use only ordinary precautions for his safety, such as calling his attention to the danger and the rules of the company forbidding such exposure, but such conductor would not be required to exercise or impose any restraint upon the plaintiff. *Fisher v. Railroad Co.*, 42 W. Va. 194.

f. Same—When increased exposure by passenger does not prevent recovery for injury—Burden of proof.

The court instructs the jury that if they believe from the evidence that plaintiff's arm protruded beyond the window of the car, yet the plaintiff can recover if the jury further believe from the evidence that the injury to him would have occurred even if his arm had not protruded beyond the window of the car; and the burden of proving that the accident would have happened even if his arm had not protruded as aforesaid devolves upon the plaintiff. *Carrico v. Railway Co.*, 39 W. Va. 96.

g. Same—Knowledge of carrier of danger to which passenger exposed—When negligence of passenger does not relieve carrier from liability.

The court instructs the jury that if they believe from

the evidence that the plaintiff was guilty of negligence, and that that negligence may have contributed to the injury, yet, if the jury further believe from the evidence that the negligent position of said plaintiff was known to the defendant or its servants, and that with such knowledge the injury to the plaintiff could then have been prevented by the use of care and diligence on the part of said defendant or its servants, then the plaintiff's negligence will not excuse or relieve the defendant from liability. *Carrico v. Railway Co.*, 39 W. Va. 99.

h. Same—Care and diligence required of carrier.

The court instructs the jury that though the plaintiff may have been guilty of negligence, and although that negligence may have contributed to the injury, yet if the defendant could, by the exercise of ordinary care and diligence, have avoided the injury, the plaintiff's negligence will not excuse or relieve the defendant from liability. *Carrico v. Railway Co.*, 35 W. Va. 400.

i. Intoxication of passenger.

The court instructs the jury that in determining the question of whether the plaintiff was guilty of contributory negligence, they may take into consideration the condition of the plaintiff at the time—that is, if he were intoxicated at the time of the injury, or partly so, they may take this fact into account in determining whether he was guilty of contributory negligence. *Fisher v. Railroad Co.*, 42 W. Va. 194.

j. Restraint upon passengers by carriers.

The court instructs the jury that a railroad company has no right or authority to impose upon its passengers any restraint even to enforce its reasonable rules. *Fisher v. Railroad Co.*, 42 W. Va. 194.

k. Preponderance of evidence when contributory negligence relied on.

The court instructs the jury that in order for the plaintiff to recover, it is only necessary that he make out his case by a preponderance of the evidence, and if the defendant relies upon the contributory negligence of the plaintiff to defeat him, said contributory negligence must be proved by a preponderance of all the evidence in the case, as well that of the plaintiff as that of the defendant. *Carrico v. Railway Co.*, 39 W. Va 102.

l. Risks assumed by passenger—Unavoidable accidents.

The court instructs the jury that the plaintiff, as a passenger on the defendant's car, is presumed to have taken upon himself all the risk necessarily incident to that mode of traveling; and if the jury believe from the evidence that, without the fault of the defendant, but by inevitable accident, plaintiff was injured, they should find for the defendant. *Fisher v. Railroad Co.*, 42 W. Va. 193.

m. Same—Negligence of carrier.

The court instructs the jury that a passenger upon a railroad train takes all the risk attending that mode of travel, except such as may be caused or incurred by the negligence of the railroad company or its servants, and unless such negligence by the defendant is shown by the evidence, the jury should find for the defendant. *Fisher v. Railroad Co.*, 42 W. Va. 193.

n. Concurrent negligence.

The court instructs the jury that if they believe from the evidence that both the plaintiff and defendant were guilty of negligence, that such negligence of both was concurrent or running together, and co-operated to pro-

duce the injury complained of, they should find for the defendant. *Fisher v. Railroad Co.*, 42 W. Va. 193.

o. Same—Apportionment of negligence.

The court instructs the jury that if they believe from the evidence that the injury in the declaration mentioned was the result of the concurrent negligence of both the plaintiff and defendant, the jury has no right to apportion the fault, and to find a verdict for the plaintiff upon that ground, but in such case they should find for the defendant. *Fisher v. Railroad Co.*, 42 W. Va. 194.

CHAPTER 15.

CIVIL DAMAGE ACT.

- a. Sale of intoxicating liquors to minors—Who may maintain suit.
 - b. Same—Unlawful sales to husband.
 - c. Same—Injury in person or in means of support.
 - d. Same—Knowledge of liquor dealer as to minority.
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- a. Sale of intoxicating liquor to minor—Right of mother injured in support, to sue for.

The court instructs the jury that if the mother of a minor son has been injured in her means of support by the intoxication of such son, caused in whole or in part by intoxicating liquors unlawfully sold to him by a liquor dealer, the mother has a right of action against the person making such sale, although at the time of such injury she may be living with a husband, on whom she depends in part for support. *McMaster v. Dyer*, 44 W. Va. 645.

b. Same—Unlawful sales to husband.

The court instructs the jury that if they believe from the evidence that the plaintiff was injured in her means of support in consequence of the intoxication, habitual or otherwise, of her husband, caused in whole or in part by the unlawful selling or giving intoxicating liquors to him by ———, they shall find for the plaintiff for all damages sustained and for exemplary damages. *Mayer v. Frobe*, 40 W. Va. 246-258.

c. Same—Injury in person or in means of support—Preponderance of evidence.

The court instructs the jury that if they believe from the preponderance of the evidence that the defendant has injured the plaintiff, in person or in means of support, in manner and form as alleged in the declaration, by unlawfully selling to her minor son, ———, intoxicating liquors, as alleged, and that his intoxication was caused, in whole or in part, by intoxicating liquors unlawfully sold to him by the defendant, as in the declaration alleged, and that such injury was the result of such intoxication, the jury should find for the plaintiff. *McMaster v. Dyer*, 44 W. Va. 645.

d. Same—Knowledge of liquor dealer as to minority.

The court instructs the jury that a sale of intoxicating liquors by a liquor dealer to a minor is unlawful, if at the time of such sale the liquor dealer knows, or has reason to believe, that the purchaser is a minor. *McMaster v. Dyer*, 44 W. Va. 646.

CHAPTER 16.**CONDEMNATION PROCEEDINGS.**

1. MAIN LINES OF RAILROADS.
2. LATERAL LINES OF RAILROADS.
3. FOR PURPOSES OF RAILROAD BRIDGES.

1. MAIN LINES OF RAILROADS.

- a. Necessity for taking property—How determined.
- b. Discretion as to location—How controlled.
- c. Permanent injury to real property.
- d. Title and possession of property—Necessity for proving.
- e. Future or prospective injury.
- f. Land condemned—Location—Market value—Compensation.
- g. Same—What not to be considered.
- h. How damages estimated.
- i. Burden of proof—Preponderance of evidence.

- a. **Necessity for taking property—How determined.**

The court instructs the jury that while it is incumbent on the petitioner to show by a preponderance of the evidence that a necessity exists for the taking of the property described in the petition, such necessity is not to be regarded and treated as an imperative, but a reasonable one, looking to the proper discharge by the petitioner of its duties to the public; and if the jury believe from the evidence that such a necessity exists, taking into consideration the present, and also the prospective needs of the petitioner, within a reasonable time, and that it has not, in this instance, unreasonably exercised the

discretion it possesses in locating its tracks, buildings, etc., then the verdict should be in its favor upon the issue presented by the ——— plea filed herein. (Note. The ——— plea referred to alleged that the land sought to be condemned was not necessary for the purposes sought). *Railroad Co. v. Oil Co.*, 35 W. Va. 214.

b. Discretion as to location—How Controlled.

The court instructs the jury that railroad companies possess a large discretion as to the location of their tracks and buildings; and this discretion is not to be controlled if it has not been exercised unreasonably. And in this case, even if the jury should believe that lands other than those in question might or could have been found and acquired suitable for the petitioner's purpose, that fact would constitute no defense or objection to the present claim. *Railroad Co. v. Oil Co.*, 35 W. Va. 214.

c. Permanent injury to real property.

The court instructs the jury that if they believe from the evidence that the property of the plaintiff has been permanently injured and damaged, and its value depreciated by the laying and construction of the railroad track in question, and that the defendant laid or had it laid and constructed by its agents and employes, then the plaintiff may recover in this action. *Fox v. Railroad Co.*, 34 W. Va. 476.

d. Same—Title and possession of property—Necessity for proving.

The court instructs the jury that to justify the plaintiff to recover damages for the laying of the track in question, it is his duty to allege both his title to and possession of the premises, by himself or his tenant, and also that his property had been permanently injured and damaged, and

rendered of less value by reason of the existence and operation of the said railroad, and also to prove his right to recover upon such allegations by a preponderance of evidence, and failing to do so, the jury must find for the defendant. *Fox v. Railroad Co.*, 34 W. Va. 478.

e. Future or prospective injury.

The court instructs the jury that in determining this case the jury are not to take into consideration any future or prospective injury or damage that the plaintiff might sustain by reason of the railroad track or its use and operation to his said property, but they may take into consideration any permanent damages to, and depreciation of the value of his said property, by the laying and construction of said track. *Fox v. Railroad Co.*, 34 W. Va. 478.

f. Land condemned—Location—Market value—Compensation.

The court instructs the jury that if they believe from the evidence, facts and circumstances before them in this proceeding, that the land mentioned and described in the notice, application and commissioners' report herein sought to be taken in this proceeding, is within the corporate limits of the town of ———, and at the time of the proposed taking thereof by the applicant, had a market value, then such market value together with the view of the premises would be the proper measure of compensation to be allowed by the jury to the defendant for the same. *Railway Co. v. Buskirk*, 57 W. Va. 417.

g. Same—What not to be considered.

The court instructs the jury that in ascertaining what would be a just compensation to the defendant for the land proposed to be taken by the applicant, as set forth

in the notice, application and commissioners' report in this proceeding, such general and intangible benefits as have accrued to this property in common with all other property in the community where it is situate, by reason of the proposed building of the —— railroad of its road into said community, can not be deducted from its fair market value, if they find it had such value, at the time the same was proposed to be taken by said railroad company. *Railway Co. v. Buskirk*, 57 W. Va. 417.

h. How damages estimated.

The court instructs the jury that in ascertaining the value of the land proposed to be taken by the —— railroad company they may properly enquire into its value by reason of its being ——, but in considering the market value of the land they must not consider the uses to which the —— railroad company had put this ground in constructing its railroad. *R. R. Co. v. Shepherd*, 26 W. Va. 680.

i. Burden of proof—Preponderance of evidence.

The court instructs the jury that the burden of proof is on the plaintiff to make out his case by a preponderance of evidence as delivered to the jury in the presence of the court and the situation of the property in question as viewed by the jury under the order of the court, and it devolves on the plaintiff by like preponderance of evidence to satisfy the jury that the defendant laid the said track. *Fox v. Railroad Co.*, 34 W. Va. 477.

2. BRANCH OR LATERAL LINES OF RAILROADS.

a. Right to construct lateral lines—Abandonment of work on main line.

b. Same—Construction of portion of main line.

c. Same.

d. "Lateral Line" defined.

a. Right to construct lateral line—Abandonment of work on main line.

The court instructs the jury that if they believe from the evidence that the petitioner built and constructed its main line of railroad as designated and contemplated by its charter from the —— boundary of the city of ——, to a point on the ——, it had and has the right to construct a branch or lateral line of railroad connecting with the main line at such point; and this, although the jury may further believe from the evidence that it ceased further work on the main line, and abandoned all intention of building and constructing further in an —— direction, or towards the —— state line. *Railroad Co. v. Oil Co.*, 35 W. Va. 213.

b. Same—Construction of portion of main line.

The court instructs the jury that if they believe from the evidence that any substantial portion of the main line of the railroad contemplated by its charter has been built or constructed by the petitioner, their verdict should be in its favor upon the issue raised by the plea. (Note. The —— plea alleged the abandonment of the main line.) *Railroad Co. v. Oil Co.*, 35 W. Va. 214.

c. Same.

The court instructs the jury that if they believe from the evidence that so much of the petitioner's railroad as has been constructed from —— to ——, is a portion of the main line of such railroad, as designated and contemplated by the charter of the —— railroad company, then their verdict should be for the petitioner, on the issue presented by the —— plea filed by the defendant. *Railroad Co. v. Oil Co.*, 35 W. Va. 214.

d. **“Lateral Line” defined.**

The court instructs the jury that if they believe from the evidence that the line of the railroad constructed from ——— to ———, is a portion of the main line of petitioner’s railroad, as contemplated by its charter, they are instructed that the length of the line connecting with such main line at ——— and running thence———, is not decisive of the question whether such second line is or is not a branch or lateral line. Neither length nor direction enter into the definition of a ‘branch or lateral’ railroad. The only limit in this state as to length is the statutory one of ——— miles. *Railroad Co. v. Oil Co.*, 35 W. Va. 213.

3. FOR PURPOSES OF RAILROAD BRIDGES.

a. **When all the property sought to be taken is not required.**

The court instructs the jury that in order that the defendant may retain a portion of the property sought to be taken in this proceeding, it is not requisite that such part should be in actual use by the defendant, if it is necessary to the proper maintaining or securing of its bridge. If, therefore, the jury find from the evidence that a portion thereof, ten feet or less in width, on all sides of the defendant’s guy-pier, is necessary to the proper maintaining of such guy-pier, and of the defendant’s bridge, then, as to such portion, they shall find for the defendant, although the whole of said portion may not be occupied by the defendant’s riprap. *Bridge Co. v. Bridge Co.*, 34 W. Va. 168.

CHAPTER 17.**CONSPIRACY.**

- a. Conspiracy defined.
- b. What necessary to constitute the offense.
- c. Acts done in pursuance of.
- d. Same—Burden of proof.
- e. Person charged with, may be convicted of assault and battery.

a. Conspiracy defined.

The court instructs the jury that a conspiracy is a corrupt agreement previously entered into between two or more persons to do by concerted action something unlawful or to accomplish some criminal or unlawful purpose or to accomplish some purpose not unlawful in itself but by unlawful means. *State v. Bingham*, 42 W. Va. 234.

b. What necessary to constitute the offense.

The court instructs the jury that before they can find the prisoner guilty of the offense charged in the indictment in this case, that they must be satisfied beyond all reasonable doubt that the said —— conspired and combined with —— and —— (who are indicted jointly with him), or either of them, to inflict punishment and bodily injury on the said ——, and that in pursuance of said conspiracy and combination the said —— did inflict punishment and bodily injury upon the body of said ——, and that unless you shall believe from all the evidence beyond all reasonable doubt that such conspiracy and combination existed between the said ——, —— and —— ——, or any two of them, —— being one, to inflict such punishment and bodily

injury, you should find the prisoner ———, not guilty.
State v. Bingham, 42 W. Va. 234.

c. Same—Acts done in pursuance of.

The court instructs the jury that if they believe from the evidence that the prisoner, ———, in pursuance of an understanding and combination between himself and ——— and ———, or either of them, assaulted ——— in the night time, on the street, in the city of ———, in this county, for the purpose of whipping him or doing him an injury, and did then and there inflict any punishment or bodily injury upon said ———, and the said ——— and ———, or either of them, were present when the assault was so made and injury inflicted by said ———, and that they, or either of them, aided or abetted said ——— in said assault, either by word or action, then they must find the prisoner guilty as charged in the indictment.
State v. Bingham, 42 W. Va. 235.

d. Same—Burden of proof.

The court instructs the jury that if they believe from the evidence that the prisoner assaulted and beat ———, and inflicted upon him injury, in this county, on or about the night of ———, ———, and that ——— and ——— were present when said assault was so made by said ——— upon said ———, and that they aided and abetted said ——— in said assault and battery, either by preventing others from interfering to prevent or stop said assault, or by assisting in administering punishment to said ——— themselves, then they must presume that said assault was made and such injury inflicted in pursuance of a combination and conspiracy between said prisoner and ——— and ———; and the burden of proving that such combination and conspiracy did not exist, and that such assault was not made and such injury inflicted in pursu-

ance thereof, is upon the prisoner, and unless he shows by clear and satisfactory proof that such combination and conspiracy did not exist, or it appears from the whole evidence and circumstances of the case, then they must find the prisoner guilty. *State v. Bingham*, 42 W. Va. 235.

e. Person charged with conspiracy may be convicted of assault and battery.

The court instructs the jury that although they may find the prisoner, ———, not guilty of the offense charged in said indictment, if they shall not be satisfied or have a reasonable doubt as to the existence of a conspiracy and combination to do the acts charged therein, yet you may find them guilty of assault and battery if you think that the evidence in the case shall warrant such verdict. *State v. Bingham*, 42 W. Va. 234.

CHAPTER 18.

CONTRACTS.

1. WRITTEN CONTRACTS — INTERPRETATION OF — ACQUISITION IN.
 2. MODIFICATION OF CONTRACTS.
 3. SEPARATE AND DISTINCT CONTRACTS.
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1. WRITTEN CONTRACTS — INTERPRETATION OF — ACQUISITION IN.
 - a. Written agreement exclusive evidence of contract.
 - b. Contracts by correspondence construed.
 - c. Same—Acceptance of—Modification of—Agency.
 - d. Same—Dates from acceptance of.

- e. What the parties to contract must account for.
- f. Accounts as evidence—Effect of—When complete.
- g. Statements of accounts—Opportunity to discover errors.
- h. Same—Burden of proof.
- i. Additional claims procured through third parties.
- j. Contract effecting compromise—Acceptance of.
- k. Same—New contract—Breach of.
- l. Contract of employment—Interpretation of and acquiescence in.
- m. Same—When acquiescence inferred.
- n. Contract releasing damages—Understanding of.
- o. Building and construction contracts—Contracts with penalties attached.
- p. Same.
- q. Same—Burden of proof.
- r. Delay in obtaining material—Burden of proof.
- s. Same—Plans of manufactured material.
- t. Same—As to when delayed material needed.
- u. Occupying intervals with other parts of work.
- v. Contract for sawing timber—Delays in.
- w. Same—Failure to procure help—Duty to procure help.
- x. Commissions for selling lands—Terms agreed upon.
- y. Same—What necessary to support contract.
- z. Same—Failure to complete contract—Party responsible for.
- z1. Revocation of contracts—Bona fide purchasers.
- z2. Commissions on goods not sold and returned.
- z3. Ambiguous contracts—Intention of parties.

a. Written agreement exclusive evidence of contract.

The court instructs the jury that when parties have made a written agreement, the writing is regarded as the exclusive evidence of the contract, and all oral negotia-

tions and stipulations preceding or accompanying the execution of the written agreement are merged in it, and are not admissible in evidence, and all such oral negotiations and stipulations should not be considered by you to contradict or vary the written policy in this case. *Maupin v. Insurance Co.*, 53 W. Va. 566.

The court instructs the jury that if they believe from the evidence that, on the day of ———, 18—, plaintiff and defendant entered upon a negotiation for the sale and assignment of the bond from A. to B., offered in evidence in this case, and that the result of said negotiation was the written agreement upon the back of said bond, signed by the plaintiff and defendant, then the legal effect of said written agreement is that if said bond was due and unpaid at the time of said agreement, the plaintiff took upon himself the risk of collecting said bond and the terms of said written agreement cannot be changed or altered by parol evidence. *Houston v. McNeer*, 40 W. Va. 368.

b. Contract by correspondence construed.

The court instructs the jury that if they believe from the evidence that the plaintiff made a contract with the defendant, and that such contract is expressed in letters, or in several writings, and a printed circular, and is the only contract between them, then the contract between the plaintiff and the defendant is a contract in writing, and the parties are bound by the terms of the written contract. *Shrewsbury v. Tufts*, 41 W. Va. 216.

c. Same—Acceptance—Modification—Agency.

The court instructs the jury that if they believe from the evidence that the plaintiff became an agent for the defendant under a contract; and that the only contract between the plaintiff and defendant is expressed in letters

from the defendant to the plaintiff bearing date on the ——— and ——— days of ———, enclosing a printed circular mentioned therein, and the letters from plaintiff to defendant bearing date ——— and ———, of ———, and if the jury further believe from the evidence that the plaintiff, by a letter dated the ——— day of ———, accepted the terms proposed to him by the defendant, as shown by the letters and circulars as aforesaid, without anything other or further in relation thereto between them, then such letters and circulars constitute the contract between the plaintiff and the defendant; and the parties are bound by the terms thereof, except so far as the same may have been subsequently modified by mutual agreement of the plaintiff and of the defendant, if, from the evidence, the jury believe that any such modification was subsequently made. *Shrewsbury v. Tufts*, 41 W. Va. 217.

d. Same—Dates from acceptance of.

The court instructs the jury that if they believe from the evidence that the contract between the plaintiff and the defendant consisted of the letters and the circular mentioned, then such contract was a contract in writing, and it bears date from the acceptance by the plaintiff of the terms proposed by the defendant, in the year ———. *Shrewsbury v. Tufts*, 41 W. Va. 217.

e. What parties to contract must account for.

The court instructs the jury that the defendant must account to the plaintiff for all compensation and amounts of money which the defendant admits or shows by his accounts in evidence to be properly credited to the plaintiff, and the defendant is entitled to be credited with such amounts as are proper to be deducted under the contract

and arrangements between the plaintiff and the defendant. *Shrewsbury v. Tufts*, 41 W. Va. 217.

f. Account as evidence—Effect of.

The court instructs the jury that the counsel for the plaintiff has agreed that the accounts offered by the defendant in evidence, and taken from his books, shall have the same effect as though the books themselves had been duly proved and produced in court; but, unless the jury believe from the evidence that the books from which said accounts were taken were books of original entry, then the same are not evidence in favor of the defendant on this trial. *Shrewsbury v. Tufts*, 41 W. Va. 217.

g. Statement of accounts—Opportunity to discover errors.

The court instructs the jury that if they believe from the evidence that there was an account stated between the parties, then the effect of such account stated is to cast the burden of proof upon the party complaining to show fraud, error, or mistake, and after a reasonable time an account rendered and not objected to, becomes admitted as correct; and if you believe from the evidence that the defendant rendered the plaintiff a statement of his account with the defendant at, or about the close of each year, during the time the plaintiff was in the defendant's employ, and afterwards, and that the plaintiff had opportunity, by the exercise of reasonable care and diligence, to discover any alleged error in the same, then, as to all the items of alleged error in such accounts stated, and not within a reasonable time thereafter specifically called to the attention of the defendant by the plaintiff, he is concluded and estopped, and, as to all such items charged in the plaintiff's account, you must find for the defendant. *Shrewsbury v. Tufts*, 41 W. Va. 218.

h. Same—Burden of proof.

The court instructs the jury that the burden of proof is on the plaintiff to make out his case by a preponderance of the evidence. In this case the plaintiff's claim, according to his bill of particulars, is for commissions alleged to have been retained improperly, and not paid to him, as shown by statements of account rendered and filed with said bill of particulars; and the jury are instructed that the burden is on the plaintiff to show, by a preponderance of the evidence, that the items referred to in such statements of accounts, and charged in his bill of particulars, are not lawful charges against the plaintiff; otherwise he is not entitled to recover in this action, and you must find for the defendant. *Shrewsbury v. Tufts*, 41 W. Va. 218.

i. Additional claims procured through efforts of third parties.

The court instructs the jury that if they believe from the evidence that the claims upon which compensation is sought to be recovered in this action, were procured for the defendant by the plaintiff under the contract between the plaintiff and defendant, and the defendant and claimants, which are in evidence in this cause, then the plaintiff is entitled to recover his proper compensation upon the amounts so recovered by the defendant upon such items of account as were placed in the hands of the defendant by the plaintiff, as aforesaid, even although they shall further find from the evidence that after such procurement there were other items added to the said claims through the efforts or by the influence of persons other than the plaintiff. *Logie v. Black*, 24 W. Va. 12.

j. Contract effecting compromise—Acceptance of.

The court instructs the jury that if they believe from the evidence that the parties to this action compromised

their differences as set forth in plaintiff's declaration, and that the writing of ———, ———, marked exhibit ———, was signed by the plaintiff after being prepared and written by the defendant's agent and that said writing embodied the actual terms of such compromise and was accepted and acted upon by defendant, then the defendant is bound by the provisions of said compromise. *Rhoades v. Railway Co.*, 49 W. Va. 501.

k. Same—New Contract—Breach of.

The court instructs the jury that if they believe from the evidence that the writing of May, 18—, marked exhibit ———, purporting to be signed by plaintiff, was in fact signed by him and the stipulations and conditions therein contained were different from the propositions made in writing by him on April. 18—, exhibit No. ———, the jury should take the last writing of May, 18—, as embodying the terms upon which the parties finally agreed to compromise; and if the jury further believe from the evidence that the defendant had given the plaintiff work, as it had agreed to do and the plaintiff failed to work to the satisfaction of his foreman or superintendent as provided in said agreement then the defendant had the right to discharge the plaintiff, and it would not be liable for any damages in this suit. *Rhoades v. Railway Co.*, 49 W. Va. 501.

l. Contracts of employment—Intepretation of and acquiescence in.

The court instructs the jury that if they believe from the evidence that, after the contract of employment was entered into between the plaintiff and defendant, defendant so interpreted the same as entitled him to charge against the plaintiff the cost and expenses of collecting the cash payments on goods sold by the plaintiff, includ-

ing the amounts retained by attorneys for collections made, and that plaintiff had notice thereof, by the statements of his accounts or otherwise, and did not, within a reasonable time after such notice was first given to him, object to such interpretation by the defendant, but, by silence, acquiesced therein, and afterwards continued to act under such contract and to take the benefits thereof, then the plaintiff was estopped and concluded from placing a different construction on said contract, no matter if he did afterwards, and later on, make objection to such interpretation by the defendant. *Shrewsbury v. Tufts*, 41 W. Va. 220.

m. Same—Acquiescence inferred.

The court instructs the jury that if they believe from the evidence that the plaintiff received, from time to time, from the defendant, statements of his account with the defendant, and was thereby afforded the opportunity to see the items in his bill of particulars mentioned, charged against him, and remained silent, and did not object to the charge of such items against him within a reasonable time after each of such statements were so rendered, then the defendant had the right to infer acquiescence of the plaintiff in the correctness of such charges, and the plaintiff is now estopped to deny the correctness of all such items to which he did not object in proper time; and, as to all such items of the plaintiff's account, you must find for the defendant. *Shrewsbury v. Tufts*, 41 W. Va. 219.

n. Contract releasing damages—Understanding of.

The court instructs the jury that if they believe from the evidence that the said plaintiff executed the paper introduced in evidence dated —, 18—, by placing his mark thereto, and if they further believe that the said plaintiff did not understand the contents of the said

paper, and could not read the same because he did not understand the English language, and if they further believe that nothing was done by any person connected with the defendant company or with the relief association to prevent the said plaintiff from having the said paper translated to him, or from otherwise becoming acquainted with the contents of the same, then it was the duty of the said plaintiff to take proper precautions himself, and of his own motion, to have such paper translated or explained to him; and if he chose to sign the same without taking such precautions, he did so at his own peril, and must take the consequences, and be bound by the paper, unless the jury believe he was induced to place his mark on said paper by misrepresentations fraudulently made. *Unfried v. Railroad Co.*, 34 W. Va. 268.

o. Building and construction contracts—Contracts with penalties attached—Delay in completing work.

The court instructs the jury that if they believe from the evidence that the whole or any part of the delay in the completion of the work provided for in the written contract which has been introduced in evidence, was due altogether to the acts or defaults of the defendant in failing to comply with the provisions of the agreement which were to be complied with upon its part, then the plaintiff is not chargeable under the provisions of the agreement with the delay so caused, and the jury, if it should find from the evidence that the plaintiff is entitled to credit for an unpaid portion of the contract price, should not charge against the plaintiff or deduct from the amount of the contract price due under the contract, any amount either at the rate of fifty dollars per day or at any other rate by reason of such delays due to the acts, omissions or neglect of the defendant. *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. —.

p. Same.

The jury is instructed that defendant is entitled to credit for fifty dollars for each day after —, 19—, until the plaintiff completed its contract, except for such days as the delay was in the belief of the jury upon the evidence attributable to the defendant. *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. —.

q. Same—Burden of proof.

The jury is instructed that upon the question whether any delay in the completion of the contract was attributable to the defendant the burden of proof is on the plaintiff and the defendant is entitled to credit for any delay which is not shown by the preponderance of evidence to be attributable to the defendant. *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. —.

r. Delay in obtaining material—Burden of proof.

The jury is instructed that the plaintiff is responsible for all delays resulting from the failure to obtain promptly material purchased from third parties unless the jury believe from the evidence that such delays are attributable to the defendant, and upon this question the burden of proof is on the plaintiff. *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. —.

s. Same—Plans of manufactured portion of material.

The jury are instructed that the defendant is not chargeable with delay caused by the corrections of any errors in the machinery which might have been discovered in time to avoid delay if the plaintiff had made reasonably careful examination of the plans and of the manufactured parts of machines. *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. —.

t. Same—As to when delayed material needed.

The jury are instructed that the defendant is not chargeable with any delay in the delivery of motors under the contract unless the plaintiff needed such motors before they were delivered. *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. —.

u. Same—Occupying intervals with other parts of work.

The jury are instructed that the lateness in delivery of any motors under the contract was not the cause of any delay in completing the contract unless the plaintiff was ready for such motors before they were delivered, and was unable to occupy the interval with other parts of this work. *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. —.

v. Contract for sawing timber—Delays in.

The court instructs the jury that if they believe from the evidence that — had a contract with — for the hauling of all the timber on the — farm and that under their said contract said — had — months from the time their said contract was made with said — in which to haul said timber to the mill or mills, the jury are hereby instructed that because said — did have such length of time in which to haul all of the said timber on said land to the mill or mills to be sawed, this length of time permitted by — to —, will not excuse any delay on the part of the plaintiff to finish sawing under his contract of —, 19—, which plaintiff could have reasonably avoided, and if the plaintiff could have finished his sawing in the exercise of reasonable diligence sooner than the plaintiff actually did conclude the sawing of lumber and ties under said contract of —, 19—, and that such delay caused the defendants damages, then the jury are instructed to allow to defendants any such damages as the

evidence shows them to have sustained by reason of such delay, unless it appears that plaintiff was delayed by the failure of defendants or their employes to keep the mill supplied with timber. *Vale v. Suitor & Dunbar*, 58 W. Va. —.

w. Same—Failure to procure help—Duty to procure help.

The court instructs the jury that if they believe from the evidence that the men in the employ of the plaintiff quit the work of sawing lumber and ties for the defendants on or about —, 19—, because of the prevalence of small-pox or the reputed prevalence of small-pox in the city of —, the fact that such men did so quit his employment will not excuse the plaintiff from running his mill steadily thereafter unless the jury further believe from the evidence that the plaintiff actually did make a reasonable and diligent effort to secure other men to run his said mill, after the former men quit his employment, unless the jury further believe from the evidence that the plaintiff could, by due diligence, have procured competent force to enable him to carry on his work according to the contract of —, 19—, after his men had so quit his employment. *Vale v. Suitor & Dunbar*, 58 W. Va. —.

x. Commissions for selling lands—Terms agreed upon.

The court instructs the jury that if they believe from the evidence and all the circumstances that the defendant —, employed the plaintiff to sell his farm at the price of \$—, and that the plaintiff did sell said farm at the price and upon the terms agreed upon in said contract of employment, and if you further find from all the evidence and circumstances that said defendant was to pay said plaintiff \$— for making said sale, then you should find for the plaintiff. *Ober v. Stephens*, 54 W. Va. 356.

y. Same—What necessary to support contracts.

The court instructs the jury that it is not necessary in order to support a contract, that the consideration should consist of any specified sum of money or article of value, but it may consist of an act to be performed, and if the jury believe from the evidence that — employed — to sell his lands for a remuneration stipulated in the contract, to be paid thereupon the sale of the lands, that this will be a sufficient consideration. *Rowan' & Co. v. Hull*, 55 W. Va. 340.

z. Same—Failure to complete contract—Party responsible for.

The court instructs the jury that if they believe from the evidence that — was a real estate agent, and as such agent, had a contract with the defendant whereby he was to sell certain lands for him, and in pursuance of such contract he procured a purchaser within the time specified in said contract, who was able, ready and willing to buy on the terms he was authorized in said contract to sell, the said — is entitled to recover the commission stipulated in said contract, even though the jury further believe from the evidence that the said contract of purchase was never completed, if they believe the completion was prevented by the act or default of the defendant. *Rowan & Co. v. Hull*, 55 W. Va. 340.

z1. Revocation of contract—Bona fide purchasers.

The court instructs the jury that if they believe from the evidence that plaintiff procured — to examine said land with the view of purchasing the same, and did this before any revocation of their contract, and that the said — made a *bona fide* offer to purchase said land at the price agreed upon in said contract in pursuance of his solicitation by said —, then the plaintiff is entitled to

recover his commission as stipulated in said contract. *Rowan & Co. v. Hull*, 55 W. Va. 340.

z2. Commissions on goods not sold and returned.

The court instructs the jury that under the contract proven by the plaintiff he is not entitled to commissions on goods returned, but only on actual cash payments made on the goods sold by him, at the time of the sale or afterwards; and if you believe from the evidence that any of the items in the bill of particulars mentioned were for commissions on goods returned, as to all such items you must find for the defendant. *Shrewsbury v. Tufts*, 41 W. Va. 220.

z3. Same—Ambiguous contracts—Intention of Parties.

The court instructs the jury that though they may believe from the evidence that the contract between the plaintiff and defendant may have been originally expressed in written letters and printed circulars, yet, if they believe that any of the terms of the contract so expressed were ambiguous, you have the right to look to the surrounding circumstances existing when the contract was made, at the situation of the parties, the subject matter of the contract, and all the subsequent acts of the parties under said contract, to determine the meaning of the contract and what was the real intention and contract between the parties. *Shrewsbury v. Tufts*, 41 W. Va. 221.

2. MODIFICATION OF CONTRACTS.

- a. Modification of contract by changing amount of compensation agreed upon.
- b. Same—Extension of time for performance of contract.
- c. Same—Succession to rights of parties to contracts.

a. Modification of contract by changing amount of compensation agreed upon.

The court instructs the jury that if they believe from the evidence that the contract in evidence in this cause between —, the defendant, on the one part, and —, on the other part, was made for the prosecution of claims procured by the plaintiff for the defendant, under the contract between the plaintiff and the defendant entered into —, 18—, also in evidence in this cause; and that the said claims were prosecuted, audited and paid by the proper authorities, and the commissions collected by the said defendant in execution of the said contracts, then the plaintiff is entitled to recover on the sum so audited and paid the amount of compensation stipulated to be paid to the plaintiff in the contract of —, 18—, which amount is — of the sum which the jury may find from the evidence was received as compensation by the defendant on any or all claims aforesaid, unless the jury shall find from the evidence that subsequent to the date of said — 18—, the plaintiff and defendant mutually agreed to modify or change the amount of compensation as fixed by said agreement, in which event the amount of compensation to be paid by the defendant to the plaintiff will be governed by the subsequent agreement so far as the same was agreed by the plaintiff and defendant to apply to any or all of the claims mentioned in the bill of particulars. *Logie v. Black*, 24 W. Va. 11.

b. Same—Extension of time for performance of contract.

The court instructs the jury that if they believe from the evidence that after the making of the written agreement between the plaintiff and the defendant, which has been introduced in evidence, an arrangement was made between them that the plans referred

to in the agreement should be modified, and if they further find from the evidence that the modifications made in pursuance of this agreement necessitated the taking of a longer time for the completion of the work provided for in the contract than would have been needed if these changes had not been made, then the plaintiff is not chargeable at the rate of fifty dollars per day provided for in the agreement for the additional time made necessary by these changes in the plans. *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. —.

c. Same—Succession to rights of parties to contracts.

The court instructs the jury that if they believe from the evidence that the plaintiff, before the — of —, 18—, gave to the defendant or to its general manager notice in writing that she elected to extend the contract of — —, 18—, for — years next ensuing — —, 18—, then the plaintiff has succeeded to the rights of — dec'd, under said contract. *Hurathall v. Boom Co.*, 53 W. Va. 94.

3. SEPARATE AND DISTINCT CONTRACTS.

a. Termination of suits dependent upon special contracts.

b. Same—Documentary evidence—Effect of.

a. Separate contracts—Termination of suit dependent upon.

The court instructs the jury that if they believe from the evidence that the contract or promise set out in the special count of the declaration, in which it is alleged that the defendant agreed to refund the \$——, in the event the ejectment suit of — v. — was decided against plaintiff in said suit, and that said contract or promise was a separate, distinct and independent contract; and if they further believe from the evidence that said suit was de-

cided against the plaintiff, and judgment was rendered in said suit for the defendant before the institution of this suit, and the money paid upon said contract, in said event the jury should find for the plaintiff. *Sayre v. Edwards*, 19 W. Va. 357.

b. Same—Documentary evidence—Effect of.

The court instructs the jury that if they believe from the evidence that the contract alleged in the special count of the declaration contained was a separate, independent and distinct contract between plaintiff and defendant in this suit from that contained in the documentary evidence, then such documentary evidence should have no effect as evidence in this action. *Sayre v. Edwards*, 19 W. Va. 357.

CHAPTER 19.

COUNTIES.

- a. Statute providing for prosecution of offenses committed within one hundred yards of county line, but in another county, held unconstitutional.

The court instructs the jury that if they believe from the evidence that the offense named in the indictment was committed not in Calhoun county but in Roane county, the jury must find the defendant not guilty, even if they believe that the evidence proves that the offense was committed within *one hundred yards* of the county line of Calhoun county. *State v. Lowe*, 21 W. Va. 795.

CHAPTER 20.

COVENANTS.

- a. Breach of covenant—Paramount title—Statute of limitations.
- b. Same—Negligence causing injury to water mill.

a. **Breach of covenant—Paramount title—Statute of limitations.**

The court instructs the jury that if they believe from the evidence that at the time of conveyance from the defendant to —, shown in evidence, and bearing date — day of —, 18—, that the part of the land thereby attempted to be conveyed, embraced by the alleged interlock or lap with the — survey of — acres, now claimed by the —, was in the actual possession of those under whom said — claims by title paramount to the title conveyed by said — to —, then there was a breach of said covenant in said conveyance *eo instanti*, and if more than ten years elapsed from that time before the bringing of this suit, the action is barred, and the jury should find for the defendant. *Illsley v. Wilson*, 42 W. Va. 763.

b. **Same—Negligence causing injury to water mill.**

The court instructs the jury that if they believe from the evidence that plaintiff has negligently permitted gravel, mud, sand, &c., to accumulate in the mill race at the mouth of the branch or at any other points, or that she has been guilty of any other negligent act whereby the supply of water to the mill has been diminished, such negligence can only be considered in fixing the amount of plaintiff's damages, and does not excuse defendant from

performing its covenants. *Hurxthall v. Boom Co.*, 53 W. Va. 94.

CHAPTER 21.

CRIMINAL LAW.

1. PRESUMPTION OF INNOCENCE.
2. REASONABLE DOUBT.
3. CIRCUMSTANTIAL EVIDENCE.
4. CHARACTER AND MOTIVE OF WITNESSES.
5. CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE.
6. INSANITY AND INTOXICATION.
7. ALIBI.
8. ADMISSIONS AND CONFESSIONS.
9. DEGREES OF PUNISHMENT.

1. PRESUMPTION OF INNOCENCE.

- a. Presumption of innocence and proof required.
- b. Same—Presumption of innocence defined.

a. Presumption of innocence and proof required.

The court instructs the jury that the defendant is, by law, presumed to be innocent, and that it is the duty of the state to prove him guilty, as charged in the indictment, beyond all reasonable doubt; and if the state fail to prove every material allegation in the indictment, then the jury must find him not guilty. *State v. Hobbs*, 37 W. Va. 820.

b. Same—Presumption of innocence defined.

The court instructs the jury that the presumption of innocence is not a mere form, to be disregarded by the

jury at pleasure, but it is an essential and substantial part of the law of the land, and binding on the jury in this case; and it is the duty of the jury to give the defendant in this case the full benefit of the presumption, and to acquit the defendant unless they feel compelled to find him guilty, as charged, by the law of the land and the evidence in this case, convincing them of his guilt, as charged, beyond all reasonable doubt. *State v. Lowry*, 42 W. Va. 210.

2. REASONABLE DOUBT.

- a. Doubt as to whether murder committed.
- b. Doubt as to whether murder or suicide.
- c. Reasonable doubt defined.
- d. Same—Substantial doubt—Not a mere possibility of innocence.
- e. Same—Must not be an arbitrary doubt.
- f. Same—Must not be a vague or uncertain doubt.
- g. Same.
- h. Same—Moral certainty—Not an absolute certainty.
- i. Same—Chimerical or conjectural doubt.
- j. Same—Doubt produced by undue sensibility.
- k. Same—Doubt as to identity of person accused.

a. Doubt as to whether murder committed.

The court instructs the jury that if they entertain any reasonable doubt from the evidence as to whether ——— was murdered or not, they should find the defendant not guilty. *State v. Ice*, 34 W. Va. 251.

b. Doubt as to whether murder or suicide.

The court instructs the jury that if after considering all the evidence and circumstances, they have a reasonable doubt as to whether the defendant shot and killed the de-

ceased, or whether she shot and killed herself, then they must give the defendant the benefit of such doubt and acquit him. *State v. Kerns*, 47 W. Va. 270.

c. Reasonable doubt defined.

The court instructs the jury that after they shall have compared and considered all the evidence in the case if they have a reasonable doubt as to the guilt of the prisoner, as charged in the indictment, they cannot convict; that by reasonable doubt is meant such a doubt, based upon the evidence, as they may honestly and reasonably entertain as to any material fact essential to prove the crime charged. It must not be an arbitrary doubt, without evidence to sustain it, but must be serious and substantial in its nature, in order to warrant an acquittal and one which men may honestly and conscientiously entertain. *State v. Hatfield*, 48 W. Va. 572.

d. Same—Substantial doubt—Not a mere possibility of innocence.

The court instructs the jury that if they have a reasonable doubt of the defendant's guilt they must acquit him, but a doubt to authorize an acquittal must be a substantial doubt arising from the insufficiency of evidence and not a mere possibility of innocence, and a reasonable doubt is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. *State v. Bickle*, 53 W. Va. 598.

e. Same—Must not be an arbitrary doubt.

The court instructs the jury that after they shall have compared and considered all the evidence in the case, if

they have a reasonable doubt as to the guilt of the prisoner, as charged in the indictment, they cannot convict; that by reasonable doubt is meant such doubts based upon the evidence as they may honestly and reasonably entertain as to any material fact essential to prove the crime charged. It must not be an arbitrary doubt, without evidence to sustain it, but it must be serious and substantial in its nature, in order to warrant an acquittal, and one which men may honestly and conscientiously entertain. *State v. Staley*, 45 W. Va. 797.

f. Same—Must not be a vague or uncertain doubt.

The court instructs the jury that a reasonable doubt is not a vague or uncertain doubt, and what the jury believe from the evidence as men, they should believe as jurors, yet, if upon the evidence in this case such a doubt is raised as would cause a juror to hesitate and to refrain from acting were it a grave business matter, then such doubt is a reasonable doubt and such juror should give the defendant the benefit of that doubt. *State v. Dickey*, 48 W. Va. 326.

g. Same.

The court instructs the jury that a reasonable doubt is not a vague or uncertain doubt and what the jury believe from the evidence as men they should believe as jurors. *State v. Bickle*, 53 W. Va. 599.

h. Moral certainty—Absolute certainty.

The court instructs the jury that proof beyond a reasonable doubt is not beyond all possible or imaginary doubt, but proof to a moral certainty, rather than an absolute certainty. *State v. Ice*, 34 W. Va. 251.

i. Same—Chimerical or conjectural doubts.

The court instructs the jury as a matter of law that in

considering the case the jury are not bound to go beyond the evidence to hunt up doubts nor must they entertain such doubts as are merely chimerical or conjectural. A doubt to justify an acquittal must be reasonable and must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that were the same kind of doubt interposed in a graver transaction of life it would cause a reasonable and prudent man to hesitate and pause it is insufficient to authorize a verdict of not guilty. If after considering all the evidence the jury can say they have an abiding conviction of the truth of the charge they are satisfied beyond a reasonable doubt. *State v. Bickle*, 53 W. Va. 599.

j. Same—Doubt produced by undue sensibility—Oath of juror—What imposed upon him by—Juror's duty to the state and to himself.

The court instructs the jury that a doubt produced by undue sensibility in the mind of the juror in view of the consequences of his verdict is not a reasonable doubt and the juror is not allowed to create sources of material for doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from that established by the evidence. The oath of a juror imposes upon him no obligation to doubt where no doubt would exist if no oath had been administered. When a circumstance is of a doubtful character the accused is entitled to the benefit of the doubt. If, however, all the facts established necessarily lead the mind to the conclusion that the defendant is guilty though there be a bare possibility merely, not supported by some good reason therefor that he is innocent, the jury should find him guilty. A juror's duty to the state, to society and to himself is equally sacred to hold for conviction, if he has an abiding satisfaction of defendant's guilt, and if after

deliberation, no juror is possessed of any good reason to doubt the defendant's guilt, it is the duty of the jury to find him guilty. *State v. Bickle*, 53 W. Va. 599.

k. Doubt as to identity of person accused.

The court instructs the jury that after considering all the evidence introduced by the prosecution, and all the evidence introduced by the defense they entertain any reasonable doubt as to whether the defendant has been identified as the person who committed the offense charged in the indictment, then the jury are instructed that they find the defendant not guilty. *State v. Lowry*, 42 W. Va. 211.

3. CIRCUMSTANTIAL EVIDENCE.

a. Character of circumstantial evidence necessary for conviction.

b. What the circumstances should exclude to a moral certainty.

a. Character of circumstantial evidence necessary for conviction—Competency of circumstantial evidence.

The court instructs the jury that one charged with crime may be convicted by a jury upon circumstantial evidence alone, if the jury believe beyond a reasonable doubt, from said circumstantial evidence, that the person so charged is guilty of the crime alleged against him. Therefore the court instructs the jury in this case that they have the right to convict the defendant upon circumstantial evidence alone, if the jury believe from said circumstantial evidence the guilt of the defendant beyond a reasonable doubt. And the court further instructs the jury that circumstantial evidence in criminal cases is not only com-

petent evidence, but is sometimes the only mode of proof, and therefore, if the jury believe from the evidence and circumstances in this case and beyond a reasonable doubt, that the defendant, with a deadly weapon, gave to the deceased a mortal wound, without any provocation, from which wound she died within a few days from the time it was so inflicted, that the said defendant was guilty of willful, deliberate and premeditated murder, unless he shows extenuating circumstances, or they appear by the case made by the state, and if he fail to show extenuating circumstances, and they do not appear from the case made by the state and all the evidence considered, the jury should find him guilty of murder in the first degree. *State v. Sheppard*, 49 W. Va. 607.

b. What the circumstances should exclude to a moral certainty.

The court instructs the jury that if the state relies for a conviction in this case upon evidence in whole or in part circumstantial, then it is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved, and that unless they do, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved, then they should find the prisoner not guilty. *State v. Allen*, 45 W. Va. 76.

4. CHARACTER AND MOTIVE OF WITNESSES.

- a. Character and motive of witnesses.
- b. Testimony of accused—Consideration of.
- c. Impeached witnesses—Testimony of.

a. Character and motive of witness.

The court instructs the jury that in arriving at a ver-

diet in this case that they are the sole judges of the facts, and credibility of each and every witness introduced in this case, and that they have the right to disregard the testimony of any witness or witnesses who, in the opinion of the jury, may have testified falsely in this case, or give to the testimony of any such witness such weight as in the opinion of the jury the same may be entitled to, and in ascertaining such weight the jury may take into consideration the character and motive of the witness as disclosed by the evidence in this case. *State v. Roberts*, 50 W. Va. 428.

b. Testimony of accused—Consideration of.

The court instructs the jury that in considering all the evidence in this case they may consider the evidence of the prisoner and how far, if at all, his interest in the case might bias his testimony, and that they give his evidence and all the other evidence in the case such weight as they may think it entitled to. *State v. Dodds*, 54 W. Va. 293.

c. Impeached witness—Consideration of testimony of.

The court instructs the jury that they are not required by law to disbelieve a witness who has testified before them in this case because the general reputation of such witness for truth and veracity in the neighborhood where he resides has been proven to be bad, and said witness shown not to be entitled to credit when on oath, but it is the province of the jury to give the evidence of any witness who has testified in this case such credit as the jury may believe from all the facts and circumstances in this case it is entitled to, the jury being the sole judges of the evidence as well as the credibility of the witnesses who have testified in this case. *State v. Roberts*, 50 W. Va. 426.

5. CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE.

- a. What considered in determining—Jury sole judges of.
- b. Same—Reasonableness of statements of.
- c. Same—Intelligence and conduct of witnesses.
- d. Same—Witnesses testifying falsely.
- e. Same.

a. What considered in determining—Jury sole judges of evidence.

The court instructs the jury that they are the sole judges of the evidence, and that they may believe or refuse to believe any witness, and that when passing upon the credibility of any witness they may rightly take into consideration his interest in the matter in controversy and his demeanor upon the witness stand. *State v. Dickey*, 48 W. Va. 326.

b. Same—Reasonableness of statements of.

The court instructs the jury that they are the sole judges of the evidence and that they may believe or refuse to believe any witness and that when passing upon the credibility of any witness they may take into consideration his interest in the matter in controversy, the reasonableness or unreasonableness of his statement, his bias or prejudice in the matter, if any appear, and his demeanor upon the witness stand. *State v. Bickle*, 53 W. Va. 600.

c. Same—Intelligence and conduct of witness.

The court instructs the jury that they are the sole judges of the evidence in this case as well as the credibility of witnesses testifying before them, and in determining the weight to be given to the evidence of any witness who has testified they have the right to take and consider the

intelligence of such witness, his conduct, appearance and demeanor while testifying, as well as the interest such witness may have in the result of the trial, and from all these, and all other facts and circumstances in the case, give the evidence of such witness such credit as the jury may believe it entitled to, the jury being the sole judges of the evidence and the weight thereof, as well as the credibility of the witnesses who testified in the case. *State v. Roberts*, 50 W. Va. 427.

d. Same—Testifying falsely—Consideration of.

The court instructs the jury that if they believe from the evidence that any witness who has testified in this case has knowingly and wilfully testified falsely to any material fact in this case, they may disregard the whole testimony of such witness, or they may give such weight to the evidence of such witness on other points as they may think it entitled to. The jury are the exclusive judges of the weight of testimony. *State v. Thompson*, 21 W. Va. 746.

e. Same.

The court instructs the jury that they are the sole judges of the weight of testimony of any witness who has testified before them in this case, and in ascertaining such weight, they have the right to take into consideration the credibility of such witness, as disclosed from his evidence, his manner of testifying and demeanor upon the witness stand, and his apparent interest, if any, in the result of the case. And if the jury believe that any witness has testified falsely as to any material fact, they have the right to disregard all the testimony of such witness so testifying falsely, or to give his testimony, or any part thereof, such weight only as the same in their opinion, may be entitled to. *State v. Staley*, 45 W. Va. 797.

6. INSANITY AND INTOXICATION—MENTAL CAPACITY.

- a. Sanity presumed—How presumption overcome.
- b. Necessity for proving insanity when relied on as defense.
- c. Same—Fanciful grounds for believing person insane.
- d. Mental capacity for knowing consequence of act.
- e. Same.
- f. Same—Mental aberration.
- g. Intoxication—When evidence as to may be considered.
- h. Same—When intoxication does not excuse homicide.
- i. Age for capacity to commit crime.
- j. Same.

a. **Sanity presumed—How presumption overcome.**

The court instructs the jury that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to their satisfaction; that if the jury believe from the evidence that the prisoner fired the shot which caused the death of —, as charged in the indictment, and at the time of the firing of said shot, the prisoner was laboring under such defect of reason, from any disease or combination of diseases, of the mind, or remotely produced by previous habits of gross intemperance, as not to know the nature or possible consequences of his act, or if he did know, then that he did not know that what he was doing was wrong, they will find the prisoner not guilty. *State v. Robinson*, 20 W. Va. 728.

b. **Necessity for proving insanity relied on as defense.**

The court instructs the jury that to entitle the prisoner

to an acquittal upon the ground that he was insane at the time of the commission of the offense charged in the indictment, such insanity must be proved to the satisfaction of the jury; and in passing upon this question they may look at the whole evidence in the case, as well that for the state as for the prisoner. *State v. Robinson*, 20 W. Va. 744.

**c. Same—Fanciful grounds for believing person insane—
How considered.**

The court instructs the jury that when insanity is relied on as a defense to a charge of crime, it must be proved to the satisfaction of the jury, in order to entitle the accused to an acquittal on that ground. If upon the whole evidence the jury believe that the prisoner was insane, when he committed the deed, they will acquit him on that ground, but not on the fanciful ground, that, though they may believe he was then sane, yet, as there may be a reasonable doubt of such sanity, he is therefore entitled to an acquittal. *State v. Maier*, 36 W. Va. 770.

d. Mental capacity for knowing consequence of act.

The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the prisoner, at the time of firing the shot or shots which caused the death of —, was capable of knowing the nature and consequence of his act, and if he did not know, then that he knew he was doing wrong, and that so knowing he fired the shot or shots at the deceased with the willful, deliberate and premeditated purpose of killing her, they will find the prisoner guilty of murder in the first degree. *State v. Harrison*, 36 W. Va. 740.

e. Same.

The court instructs the jury that if they believe from

the evidence beyond a reasonable doubt, that the prisoner, though intoxicated at the time of the firing of the shot, which caused the death of the deceased, was capable of knowing the nature and consequences of his act, and if he did know, then that he knew he was doing wrong, and that so knowing he fired the shot at the deceased with the willful, deliberate and premeditated purpose of killing him, they will find the prisoner guilty of murder in the first degree. *State v. Robinson*, 20 W. Va. 743.

f. Same—Mental aberration.

The court instructs the jury that if they believe from the evidence that — murdered —, as charged in the indictment, and had at the time sufficient power of mind to distinguish between the right and the wrong of such an act, although they may believe he suffered from mental aberration as to other matters, the verdict ought to be "guilty." *State v. Maier*, 36 W. Va. 770.

g. Intoxication—When evidence as to is competent for consideration of jury.

The court instructs the jury that where a statute establishes degrees of the crime of murder, and provides that all willful, deliberate and premeditated killing shall be murder in the first degree, the evidence given on the trial tending to prove that the accused was intoxicated at the time of the killing, is competent for the consideration of the jury upon the question whether the accused was in such a condition of mind as to be capable of deliberation and premeditation. *State v. Hertzog*, 55 W. Va. 83.

h. When intoxication does not excuse homicide.

The court instructs the jury that if they believe from all the facts and circumstances in the case, that the prisoner wilfully, maliciously, deliberately and premedi

tatedly killed the deceased, they should find him guilty of murder in the first degree, although he was intoxicated at the time of the killing. *State v. Douglass*, 28 W. Va. 301.

i. Age for capacity to commit crime—How determined.

The court instructs the jury that to establish capacity to commit crime in a person over seven and under fourteen years, it is not necessary that any witness shall state that he has such capacity, but the same may be shown to exist by the appearance and general conduct of the accused, and by his testimony as a witness before the jury. *State v. Williams*, 40 W. Va. 269.

j. Same.

The court instructs the jury that a person is amenable to punishment for crime if he be of sufficient understanding to be able to distinguish right from wrong. *State v. Williams*, 40 W. Va. 269.

7. ALIBI.

- a. In general.
- b. Reasonable doubt as to establishment of alibi.
- c. Failure of full proof of alibi.

a. In general.

The court instructs the jury that if they believe from the evidence that at the time the paper writing mentioned in the indictment was forged or uttered, or attempted to be employed as true, with the knowledge that said paper writing was false and forged, if at that time the defendant, —, was in —, Ky., as shown by the witness for the defendant, and was not present in —, — county, W. Va., at the time the alleged offense was committed,

then the jury are instructed that they must acquit the defendant. *State v. Lowry*, 42 W. Va. 210.

b. Reasonable doubt as to establishment of alibi.

The court instructs the jury that if they entertain any reasonable doubt as to whether or not the defendant was in —, Ky., or —, in — county, W. Va., at the time the offense charged was committed, then it is a rule of law inflexible in its operation, and the sworn duty of the jury, to give the benefit of such doubt to the defendant and to acquit him. *State v. Lowry*, 42 W. Va. 210.

c. Failure of full proof of alibi.

The court instructs the jury that if they should entertain a reasonable doubt as to the defendant's guilt, they should find him not guilty, although the jury might not be able to find that the alibi was fully proved. *State v. Lowry*, 42 W. Va. 211.

8. ADMISSIONS AND CONFESSIONS.

a. What may be believed and what rejected.

The court instructs the jury that where a confession is received in evidence, the jury may believe that which charges the prisoner, and reject that which is in his favor if they see sufficient grounds for so doing from the evidence in the case. *State v. Allen*, 45 W. Va. 75.

9. DEGREES OF PUNISHMENT.

a. What verdicts permitted under indictment for murder —Punishments imposed.

The court instructs the jury that in the indictment in this case there is charged murder of the first degree, murder in the second degree, voluntary manslaughter, invol-

untary manslaughter and assault and battery. Murder of the first degree is punished in this state by death or confinement in the penitentiary for life. Murder of the second degree is punished by confinement in the penitentiary not less than five nor more than eighteen years. Voluntary manslaughter is punished by confinement in the penitentiary not less than one nor more than five years. Involuntary manslaughter and assault and battery are misdemeanors and punished by confinement in jail or by fine or both. *State v. Dodds*, 54 W. Va. 293.

CHAPTER 22.

DAMAGES.

1. GENERAL PRINCIPLES.
 2. EXEMPLARY, PUNITIVE OR VINDICTIVE DAMAGES.
 3. COMPENSATORY DAMAGES.
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1. GENERAL PRINCIPLES.
 - a. Defective machinery and appliances—Duty of master as to.
 - b. Same—Knowledge of master as to.
 - c. Safe means of transportation—Duty of railroads to furnish employes with.
 - d. Ejecting passengers from passenger trains.
 - e. Ejecting persons from freight trains.
 - f. Same—Use of needless force in.
 - g. Unlawful combinations—Liability of persons acting under.
 - h. Diversion of stream of surface water.
 - i. Defective plumbing—Injury to tenant caused by.

- j. Changing grade of streets—Injury to property caused by.
- k. Injury to land leased for specific use.
- l. Permanent injury to real estate by railroad company.
- m. Delay in sawing timber.
- n. Injury to water mill by construction and use of boom.
- o. Mitigation of damages.

a. Defective machinery and appliances—Duty of master as to.

The court instructs the jury that it is the duty of the master who sets a servant to work in a place of danger, or with dangerous machinery or appliances, to give him such notice and instructions as are reasonably required by the youth, inexperience or want of capacity of the servant; and failing to do so, the master is liable for the damage suffered through such failure. *Giebell v. Collins Co.*, 54 W. Va. 525.

b. Same—Knowledge of master as to.

The court instructs the jury that if they believe from all the evidence and circumstances that the defendant knew, or by the exercise of due care and caution could have known, that the said — was not of sufficient strength to bear the pressure necessary to be brought upon it in performing the work required to be done by the plaintiff, and further, that the same was not sufficient, then the defendant was guilty of negligence and liable to the plaintiff in damages, not exceeding the sum laid in the declaration, unless they further believe from all the evidence and circumstances, to their satisfaction, that the plaintiff also knew, or by the exercise of due care and caution could have known that the said — was insuffi-

cient to bear the pressure necessary, in the performance of the work aforesaid. *Hoffman v. Dickinson*, 31 W. Va. 150.

c. Safe means of transportation—Duty of railroad company to furnish employes with.

The court instructs the jury that it is the duty of a railroad company, when it furnishes transportation to its employes in cars from one point of its road to another, to provide a reasonably well constructed and safe track, to furnish well constructed and safe cars for the use of such employes, and to exercise continued supervision over the same, and keep them in good and safe repair and condition; and if it fail to do so, and suffers its track or its cars from any cause to become dangerous and unsafe, and this condition is known to the company, or to any servant to whom it may have delegated the performance of these duties, or might have become known to it or to such servant by the exercise of reasonable care and diligence, and injury results to one of its servants, not having such delegated power, without fault on his part, while in the performance of his duty, the company is liable for damages. *Reese v. Railroad Co.*, 42 W. Va. 336.

d. Ejecting passengers from passenger trains.

The court instructs the jury that if they believe from the evidence in this case that the conductor, before he removed the plaintiff from the defendant's car, offered to carry the plaintiff from —— to ——, if the plaintiff would agree to afterwards pay him the fare required for his transportation, and that the plaintiff refused to accept said offer of said conductor, and thereupon he was ejected by said conductor from the train, that in such case, although the jury may believe that the plaintiff was wrongfully removed from the defendant's car, yet the plaintiff

can not recover punitive or exemplary damages, but can only award compensatory damages, if any, for so being put off the train. *Moore v. Railroad Co.*, 41 W. Va. 179.

e. Ejecting persons from freight trains.

The court instructs the jury that if they believe from the evidence that the plaintiff got aboard of one of the — railroad's freight trains in the month of —, —, without any right or permission to do so from the defendant, or any of its employes, and was a trespasser thereon; and if they further believe from the evidence that while the said plaintiff was on the said train he was kicked or forced therefrom by an order or command given by the conductor on said train, and while said train was in motion, and moving at a rate of speed rendering it unsafe or dangerous to eject the said plaintiff by force or violence therefrom; and if they further believe that said plaintiff was ejected by force or violence from said train by the order or command of the conductor thereof, and that, in consequence of being so ejected from said train, said plaintiff sustained any physical injuries, then the jury should find for the plaintiff and assess his damages at such sum as will be commensurate with such injuries, not exceeding, however, the sum sued for in this action. *Landers v. Railroad Co.*, 46 W. Va. 497.

f. Same—Use of needless force in.

The court instructs the jury that in the absence of proof to the contrary, the power or authority to eject any and all trespassers from the freight train upon which the plaintiff was attempting to ride, after the train had been signalled to leave the yard at — by the conductor, and was in motion, and going —, on the main track on its regular trip, and upon which said conductor had taken his position, belonging to the conductor thereof, as such

conductor he could not exercise this power or authority so as to needlessly or wantonly to cause injury to another, even to a trespasser on his train; and if the jury believe from the evidence that such conductor did exercise such power or authority by commanding or ordering the said plaintiff to be kicked or forced from said train while the said train was going at such a rate of speed as to make it unsafe or dangerous to life or limb to thus eject said plaintiff from the said train, and if the jury further believe from the evidence that said plaintiff was so forced or ejected from said train, and thereby and in consequence thereof, sustained personal and physical injury, the jury are authorized, under such circumstances, to find a verdict for the plaintiff, and to assess his damages at such sum as the evidence may justify. *Landers v. Railroad Co.*, 46 W. Va. 498.

g. Unlawful combinations—Liability of persons acting under.

The court instructs the jury that if they believe from the evidence that —, —, —, —, — and — combined for an unlawful purpose, and in the execution of that purpose, as a consequence of that unlawful combination, the plaintiff was arrested without probable cause, and imprisoned by any of the defendants, the law is for the plaintiff, with the plea of not guilty, and they must find for him such damages as they, in their discretion, may deem proper, not exceeding the amount laid in the writ. *Bloss v. Plymale*, 3 W. Va. 399.

h. Diversion of stream of surface water—Encroachment of stream upon property of land owner.

The court instructs the jury that in repairing, maintaining or replacing the bank of the run next his —, the defendant has no right to change or narrow the natur-

al course of the run so as to cause it to encroach upon the property of the plaintiff, or to wash away his ground; and if the jury believe from the evidence that in maintaining, repairing or replacing said bank, he has so narrowed or changed the natural course of said run, he is liable for any damages thereby occasioned. *Hargreaves v. Kimberly*, 26 W. Va. 791.

i. Defective plumbing — Injury to tenant's property caused by.

The court instructs the jury that if they believe from the evidence that the plaintiff was a tenant of the defendant, and that in consequence of the defective plumbing or want of repairs, or negligence of the defendant, the plaintiff suffered an injury to his property without any fault of his own, then the plaintiff is entitled to recover damages for the injury sustained in consequence thereof. *Michaelson v. Cautley*, 45 W. Va. 534.

j. Changing grades of streets.

The court instructs the jury that if they believe from the evidence that the plaintiff purchased the lot in the declaration mentioned and built his residence thereon, and that the lot abutted on the ——— turnpike, and when so purchased and built upon, it was out of the limits of ———, but that the limits of ——— were subsequently extended so as to include this lot, and that the defendant in improving ——— street, formerly the ——— turnpike, to the entire width thereof and close up to the line of the plaintiff's lot inflicted damage on the plaintiff, then it is immaterial whether the grade of the ——— turnpike on that portion of it which was graded at the time of the plaintiff's purchase of this lot, was materially altered or not, or whether it was widened out to or near the plaintiff's line at substantially the same grade, as existed on the graded portion of the ——— turnpike, as it had

existed before, or whether this grade in this widening was changed, provided the change made in improving this street by the defendant was such as to interrupt the plaintiff in the possession and enjoyment of his property. For if this was the case, or the plaintiff was obstructed in his mode of ingress and egress to and from his property, he is entitled to recover such damages, as you may find from the evidence he has sustained by reason thereof, and it makes no difference whether the old grade of the ——— turnpike was changed or not, the question for the jury is 'Did what the defendant performed in improving this street damage the property of the plaintiff?' If so, he is entitled to recover. *Hutchinson v. Parkersburg*, 25 W. Va. 238.

k. Lease of land for specified use—Risks assumed by lessor—When lessee liable.

The court instructs the jury that any person leasing property for a specified use, in the absence of an express covenant to the contrary, assumes the risk of the ordinary wear and tear of such property resulting from such use, and the said lessee is not liable for damages to said property resulting from such use, unless caused by his wrongful or neglectful act. *Rogers v. Boom Co.*, 39 W. Va. 275.

l. Permanent injury to real estate by railroad company—Depreciation in value caused by.

The court instructs the jury that if they believe from the evidence that the property of the plaintiff has been permanently injured and its value depreciated by the laying and construction of the embankment and railroad track, and that the defendant constructed and laid, or had constructed and laid by its agents, the said embankment and track, then the plaintiff is entitled to recover for damages. *Hast v. Railroad Co.*, 52 W. Va. 402.

m. Delay in sawing timber.

The court instructs the jury that if they believe from the evidence that the plaintiff began the work of sawing the lumber and ties for the defendants under and by virtue of the contract read in evidence to the jury, bearing date ———, some time in the latter part of ———, 19—, and that such mill had a capacity to saw from ——— to ——— feet of lumber per day, and if the jury further believe from the evidence that by steadily running said mill the plaintiff could have sawed all the lumber and ties charged by the plaintiff against the defendants specified in his bill of particulars or account, filed with his declaration in this cause on or before ———, 19—, except any unavoidable accident occurring during that period, and if the jury further believe from the evidence that a failure to saw the lumber and ties for the defendants charged in said account during said period, occasioned the defendants any loss or damage as specified in their special plea filed in this cause, then the jury are instructed that they may ascertain from the evidence what such loss or damages amount to and allow and assess them in favor of the defendants. *Vale v. Suitor & Dunbar*, 58 W. Va. ———.

n. Injury to water mill by construction and use of boom.

The court instructs the jury that if by a fair preponderance of the evidence the plaintiff has proved that the defendant's boom has caused the water to be slackened or deadened so as to cause sand or sediment to settle in the river below the plaintiff's mill, and that such settling of the sand or sediment has caused the injury complained of in the plaintiff's declaration, then the jury should find for the plaintiff such damages as he has sustained during the five years next preceding the institution of this suit. *Pickens v. Boom Co.*, 58 W. Va. ———.

o. Mitigation of damages.

The court instructs the jury that if they believe from

the evidence that plaintiff has negligently permitted gravel, mud, sand &c., to accumulate in the mill race at the mouth of the branch or at any other points, or that he has been guilty of any other negligent act whereby the supply of water to his mill has been diminished, such negligence can only be considered in fixing the amount of plaintiff's damages, and does not excuse defendant from performing its covenants of ———, 18—. *Hurxthall v. Boom Co.*, 53 W. Va. 101.

(See, also, *Vinal v. Core*, 18 W. Va. 4.)

II. EXEMPLARY, PUNITIVE OR VINDICTIVE DAMAGES.

- a. Sale of intoxicating liquors to minors—Exemplary damages defined.
- b. Unlawful sale of intoxicating liquors to husband.
- c. Same.
- d. Physical and mental suffering—Hazardous obstructions near railroad track.
- e. Physical suffering—Same.
- f. Physical and mental suffering—Injuries sustained while attempting to board street car—Inability to bear children.
- g. Same—How damages estimated—Contingent or speculative damages.
- h. Same—Injuries caused by defective sidewalks—Loss of time—Expenses incurred—Permanent injuries.
 - i. Same.
 - j. Same.
- k. Same—Liability of owner of saw mill for injuries sustained by employe.
 - l. Same—Displaced telephone wires—Injuries caused by.
- m. Same—Malicious prosecutions—Injuries to feelings, person and character.

- n. Same—False arrest—Outrage, indignity and humiliation put upon party.
 - o. Same—Seduction of minor daughter—Shame, loss of respect and mortification of parent.
 - p. Same—Explosion of dynamite—Injuries caused by.
 - q. Same—Assault and battery.
- a. **Sale of intoxicating liquors to minor—Exemplary damages defined.**

The court instructs the jury that if they believe from the preponderance of the evidence that the plaintiff is the mother of ———, that he is a minor, and that the defendant, by himself or his clerk, or any one acting under his authority, unlawfully sold to the said ———, on the ——— day of ———, 18——, at the defendant's place of business, at ———, in this county, intoxicating liquors, and that the said intoxicating liquors, in whole or in part, caused the intoxication of said ———, and that by reason of such intoxication the plaintiff was injured, in person or means of support, in manner and form as in the declaration alleged, then the jury should find for the plaintiff, and assess in her favor such damages as the jury should find from the evidence she has sustained by reason of such intoxication, and also exemplary damages, but not exceeding together ——— dollars. By "exemplary damages" is meant such damages as should be inflicted upon a wrongdoer as a warning to him and others to prevent a repetition or commission of similar wrongs. *McMaster v. Dyer*, 44 W. Va. 646.

b. **Unlawful sale of intoxicating liquors to husband.**

The court instructs the jury, that if the jury believe from the evidence that the plaintiff was injured in her means of support in consequence of the intoxication, habitual or otherwise, of her husband, caused in whole or in part by the unlawful selling or giving of intoxicating liq-

uors to him by ———, they shall find for the plaintiff for all damages sustained and for exemplary damages. *Mayer v. Frobe*, 40 W. Va. 246-258, overruling *Pegram v. Stortz*, 31 W. Va. 220.

c. Same.

The court instructs the jury that if they believe from the evidence that ——— sold or gave to the plaintiff's husband intoxicating liquors when they knew or had reason to believe such husband was a person in the habit of drinking to intoxication, such selling or giving was unlawful. And if they further believe that by reason of intoxication, in whole or in part, of said husband, resulting from such sale of intoxicating liquors, the said husband did not provide for and support the plaintiff, your verdict should be for the plaintiff for all damages sustained and for exemplary damages. *Mayer v. Frobe*, 40 W. Va. 246-258.

d. Physical and mental suffering—Hazardous obstructions near railroad track.

The court instructs the jury that if they find the defendant guilty, they are, in estimating the damage, at liberty to consider the health and condition of the plaintiff before the injury complained of as compared with his present condition in consequence of said injuries, and whether said injury is, in its nature, permanent, and how far said injury is calculated to disable the plaintiff from engaging in those pursuits and employments for which in the absence of said injury he would have been qualified, and also the physical and mental suffering to which he was subjected or may be subjected by reason of said injuries, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has sustained. *Riley v. Railroad Co.*, 27 W. Va. 151.

e Physical suffering—Same.

The court instructs the jury that if they find for the plaintiff they are, in estimating the damages, at liberty to consider the health and condition of the plaintiff before the injury as compared with his present condition in consequence of said injury; and also whether said injury was permanent in its nature, and how far it is calculated to disable the plaintiff from engaging in those pursuits and occupations which, in the absence of said injury, he would have been qualified, and also the physical suffering to which he was subjected by reason of said injury, and to allow such damages as, in the opinion of the jury, will be a fair and just pecuniary compensation for the injury which the plaintiff has sustained. The jury may include any losses that may occur in the future to the plaintiff, provided they are such as the jury believe from the evidence will actually result to the plaintiff as the proximate damages from the wrongful act complained of. *Carrico v. Railway Co.*, 39 W. Va. 102.

f. Physical and mental suffering—Injuries sustained while attempting to board street car—Inability to bear children.

The court instructs the jury that if under the evidence they find the defendant guilty as in the declaration alleged, then in estimating the damage of the plaintiff they have the right to take into consideration the personal injuries inflicted upon the plaintiff in consequence of the defendant's wrongful acts, if any such injuries are proved, and the pain and suffering, both mental and physical, undergone by her in consequence of such injuries, if such pain and suffering have been proved, and if they further believe from the evidence that the said injuries are permanent, and that they include an inability to have any child or children, these facts may also be included in their estimate, if they further believe from the evidence that

such permanent injury, including such inability, resulted from such wrongful acts. *Normile v. Traction Co.*, 57 W. Va. 132.

g. Same—How damages estimated—Contingent or speculative damages.

The court instructs the jury that if they believe from the evidence that the defendant's negligence was the cause of the injury, they will find for the plaintiff and in estimating damages will allow for pecuniary loss incurred by the plaintiff, as the result of such injury, and for her pain and suffering directly resulting from the injury. In estimating damages, they may also allow for future consequences, but can only allow for such future consequences as they believe from the evidence as are reasonably certain to be sustained by the plaintiff. The consequences which are contingent, speculative or merely possible are not to be considered in ascertaining the damages. *Normile v. Traction Co.*, 57 W. Va. 132.

h. Same—Injuries caused by defective sidewalks—Loss of time—Expenses incurred—Permanent injuries.

The court instructs the jury that if they believe from the evidence that the plaintiff was injured as charged in his declaration, then the rule for the measurement of damages is substantially that the plaintiff's damages must be measured by the loss of time during the cure of such injury or injuries, and the expenses incurred in respect thereto, the pain and suffering undergone by the plaintiff, and any permanent injury, especially when it causes a disability for further exertion, in whole or in part, and consequent pecuniary loss. *Bowen v. City of Huntington*, 35 W. Va. 698.

i. Same.

The court instructs the jury that if they find for the

plaintiff, that then the plaintiff is entitled to recover all damages proved by him as caused by the alleged injury, and that in estimating his damages they will consider the evidence in relation to plaintiff's loss of time occasioned by his injury; also the evidence in relation to his pain and suffering resulting from such injury, and the evidence in relation to the extent and permanency of said injury. *Phillips v. City of Huntington*, 35 W. Va. 408.

j. Same.

The court instructs the jury that if they find for the plaintiff, the rule for measuring her damages in this case is substantially that the damages awarded her should compensate her for her loss of time brought about by such injury, and the expenses incurred in respect thereto, her pain and suffering consequent thereon, and any permanent injury, especially if it causes a disability for further exertion, either in whole or in part, and consequent pecuniary loss. *Snoddy v. City of Huntington*, 37 W. Va. 114.

k. Same—Liability of saw mill owner for injuries sustained by employe.

The court instructs the jury that if they believe from the evidence that the plaintiff in his action is entitled to recover, he may recover the expenses of his cure, the value of his time lost during his cure, and a fair compensation for his physical and mental suffering caused by the injury as well as any permanent reduction of his power to earn money. *Giebell v. Collins Co.*, 54 W. Va. 525.

l. Same—Displaced telephone wire—Injuries caused by.

The court instructs the jury that if they find the issue for the plaintiff, in determining the measure of damages they may take into consideration the mental and physical pain and suffering endured by the plaintiff since he re-

ceived the injury complained of, the character and extent of such injury, and its continuance if permanent, together with his loss of time, service and disability, if any, resulting from said injury, to earn a livelihood for himself and family, and his necessary expense for medicine and medical attention; and may find for him such sum as, in the judgment of the jury under the evidence, will be a fair compensation for the injury. *Hannum v. Hill*, 52 W. Va. 176.

m. Same—Malicious prosecutions—Prosecutions without probable cause—Malice express or implied.

The court instructs the jury that although no actual damages may have been proven by the plaintiff as to actual attorney fees and expenses about his defense in the prosecution commenced or pursued against him by the defendant, and although he may have proven no actual damages for loss of time because of the prosecution against him, but of all this the jury are to judge from the evidence in the case, yet the jury may give such damages as they may think proper, for the injury to the plaintiff's feelings, person and character, by his detention in custody and prosecution, if they believe from the evidence that there was a prosecution commenced or pursued against him by the defendant and that said prosecution was instigated by the defendant without probable cause therefor, and with malice express or implied from the want of probable cause, and that the prosecution was conducted to its termination to the final discharge of the plaintiff, without proof as to the amount of such damages, and the jury may give such punitive or exemplary damages as they may think proper for the conduct of the defendant, if they believe from the evidence in the case that the said prosecution against the plaintiff was commenced or pursued for the private ends of the defendant, or if they believe from the evidence that said prosecution was com-

menced or pursued with reckless disregard of the rights of the plaintiff, and may assess such damages without proof as to the amount thereof, the amount not to exceed that laid in the declaration. *Waldron v. Sperry*, 53 W. Va. 122.

n. Same—False arrest—Outrage, indignity and humiliation put upon party.

The court instructs the jury that if they find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the expense and loss of time, if any, incurred by the plaintiff; also the bodily and mental pain and anguish resulting from the defendant's acts as proved; and for the outrage and indignity and humiliation put upon the plaintiff, to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injuries sustained, not exceeding the amount sued for herein. *Gillingham v. Railroad Co.*, 35 W. Va. 602.

o. Same—Seduction of minor daughter—Shame, loss of respect and mortification of parent.

The court instructs the jury that if they believe from the evidence that the plaintiff did sustain loss of services of his daughter, and that such loss of services was occasioned by the seduction and wrongful act of the defendant, then you may take into consideration the shame, loss of respect and mortified feeling of the plaintiff, and give such exemplary damages as you may believe the plaintiff entitled to. *Riddle v. McGinnis*, 22 W. Va. 262.

p. Same—Explosion of dynamite—Injuries caused by.

The court instructs the jury that if they find the issue for the plaintiff, in determining the measure of damages they may take into consideration the mental and physical pain and suffering endured by the plaintiff since he re-

ceived the injury complained of, in consequence thereof, the character and extent of such injury, and its continuance, if permanent, together with his loss of time and service, and his disability, if any, resulting from said injury to earn a livelihood for himself and family, and his necessary expenses for medicine and medical attention; and may find for him such sum as, in the judgment of the jury under the evidence, will be a fair compensation for the injury, not to exceed the amount laid in the declaration. *Schwartz v. Schull*, 45 W. Va. 411.

q. Assault and battery.

The court instructs the jury that if they believe from the evidence that the defendant committed an assault and battery upon the plaintiff as alleged in the declaration, and that she is entitled to recover, then in determining the amount of damages they are authorized to take into consideration any physical injury, if any, caused thereby, as well as any physical suffering, if any, caused thereby, and all such punitive or exemplary damages as they may judge proper and just in the premises, if they find from the evidence that the assault and battery was wanton or willful. *Stevens v. Friedman*, 58 W. Va. —.

III. COMPENSATORY DAMAGES — HOW ESTIMATED AND FIXED.

1. AGAINST RAILROAD COMPANIES.
2. AGAINST MUNICIPAL CORPORATIONS.
3. AGAINST MASTER FOR INJURIES SUSTAINED BY SERVANTS.
4. AGAINST LANDLORDS.
5. AGAINST STEAMBOAT COMPANIES.
6. AGAINST PERSONS TAKING PROPERTY WITHOUT OWNER'S CONSENT.
7. AGAINST BRIDGE COMPANIES.

8. AGAINST BOOM COMPANIES.

9. AGAINST PULP MILL OWNERS

1. AGAINST RAILROAD COMPANIES.

- a. Delay in shipping live stock.
- b. For killing live stock.
- c. For negligently causing death of parent.
- d. Same—Prospective loss—Approximate damages.
- e. For ejecting passenger from train.
- f. For dismissing employe.
- g. For injury to water mill by constructing embankments.
- h. Taking lands without owner's consent—Future injury—Permanent injury.
- i. Same—Market value of property.
- j. Same—What not to be considered.
- k. Uses to which land to be put.

a. **Delay in shipping live stock.**

The court instructs the jury that if they believe from the evidence that there was such unreasonable delay on the part of the defendant or its servants in transporting said cattle to the city of —, they should find for the plaintiff; and if they further believe from the evidence that the plaintiff was damaged by said delay, in assessing such damages they should take into consideration all damages naturally and proximately resulting from such delay. *Bosley v. Railroad Co.*, 54 W. Va. 571.

b. **Killing live stock—Market value of stock.**

The court instructs the jury that while the measure of damages is the value of the stock when killed, that such value is the market value of such stock, and not some peculiar or particular value attached to it by the plaintiff. *Bullington v. Railroad Co.*, 32 W. Va. 440.

c. For negligently causing death of parent.

The court instructs the jury that in estimating the pecuniary damages they may take into consideration the nurture, instruction and physical, moral and intellectual training which the children would have received from their father. *Searles v. Railway Co.*, 32 W. Va. 374.

d. Same—Prospective damages—Approximate damages.

The court instructs the jury that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of their father, they are not limited to the loss actually sustained at the precise period of his death, but may also include prospective losses, provided they are such as the jury believe will actually result to the distributees as the proximate damages arising from the wrongful death. *Searles v. Railway Co.*, 32 W. Va. 375.

e. For ejecting passenger from train.

The court instructs the jury that if they believe from the evidence that the conductor before he removed the plaintiff from the defendant's car, offered to carry the plaintiff from — to —, if the plaintiff would afterwards agree to pay him the fare required for his transportation, and that the plaintiff refused to accept said offer of said conductor, and thereupon he was ejected by said conductor from said train, that in such case, although the jury may believe that the plaintiff was wrongfully removed from the defendant's car, yet the plaintiff cannot recover punitive or exemplary damages, but can only award compensatory damages, if any, for so being put off the train. *Moore v. Railroad Co.*, 41 W. Va. 179.

f. Dismissing employe—Duty to seek other employment.

The court instructs the jury that if a person is hired

for service for a given term and is wrongfully dismissed, the law imposed upon him the duty to seek other employment, and to the extent that he obtains it and earns wages, or might have done so, his damages are reduced. *Grover v. Railroad Co.*, 53 W. Va. 107.

**g. Injury to water mill by constructing embankments—
Burden of proof—Nominal damages.**

The court instructs the jury that the burden is upon the plaintiff to prove to them the damages, if any, which he has suffered by reason of the alleged wrongful act of the defendant, and wherein and what such damages are; and if the plaintiff has failed to prove any damages, although he proves the wrongful act by the defendant whereby his water power was diminished, they can give only nominal damages. *Watts v. Railroad Co.*, 39 W. Va. 208.

h. Land taken without owners consent—Future or prospective injury—Permanent injury.

The court instructs the jury that in determining this case the jury are not to take into consideration any future or prospective injury or damage that the plaintiff might sustain by reason of the railroad track or its use and operation to his said property, but they may take into consideration any permanent damages to, and the depreciation of the value of, his said property, by the laying and construction of said track. *Fox v. Railroad Co.*, 34 W. Va. 478.

i. Same—Market value of property.

The court instructs the jury that if they believe from the evidence, facts and circumstances before them in this proceeding that the land mentioned and described in the notice, application and commissioners' report herein sought to be taken in this proceeding, is within the corporate limits of the town of —, and at the time of the

proposed taking thereof by the applicant, had a market value, then such market value, together with the view of the premises, would be the proper measure of compensation to be allowed by the jury for the same. *Railway Co. v. Buskirk*, 57 W. Va. 417.

j. Same—What not to be considered.

The court instructs the jury that in ascertaining what would be a just compensation to the defendant for the land proposed to be taken by the applicant, as set forth in the notice, application and commissioners' report in this proceeding, such general and intangible benefits as have accrued to this property in common with all other property in the community where it is situate, by reason of the proposed building of the — railroad of its road into said community, cannot be deducted from its fair market value, if they find it has such value, at the time the same was proposed to be taken by said railroad company. *Railway Co. v. Buskirk*, 57 W. Va. 417.

k. Same—Uses to which lands taken to be put.

The court instructs the jury that in ascertaining the value of the land proposed to be taken by the — railroad company, they may properly enquire into its value by reason of its being —, but in considering the market value of the land they must not consider the uses to which the — railroad company had put, or may put this ground, in constructing this railroad. *Railroad Co. v. Sheppard*, 26 W. Va. 680.

2. AGAINST MUNICIPAL CORPORATIONS.

- a. Injuries caused by defective sidewalks.
- b. For changing grade of streets.
- c. Same.

a. Injuries caused by defective sidewalks—Aggravated damages.

The court instructs the jury that if they believe from the evidence that the plaintiff was afflicted with a disease which existed at the time of the alleged injury, which disease was aggravated by such injury, that the plaintiff, on satisfactory proof of the existence of the defect in the sidewalk in the declaration mentioned, and that he was injured thereby, is entitled to full compensatory damages. *Bowen v. City of Huntington*, 35 W. Va. 698.

b. Injuries to property caused by changing grade of street—"Just compensation"—Definition of.

The court instructs the jury that by the words "just compensation" used in the constitution, which shall be paid for private property damaged for public use, means that amount of money that will place the party in as good condition as she was before the injury was done, such a sum of money, the possession whereof will be equivalent to all the loss, injury and damage suffered by the party injured in consequence of the action of the defendant. *Blair v. City of Charleston*, 43 W. Va. 73.

c. Same.

The court instructs the jury that if they believe from the evidence that the city of — has injured the property of the plaintiff without her consent having been first obtained, that it is your duty to ascertain and determine the extent of said injury, and by your verdict compensate her for said injury. *Blair v. City of Charleston*, 43 W. Va. 73.

3. AGAINST MASTER FOR INJURIES SUSTAINED BY SERVANTS.

- a. Defective material—Losses resulting to distributees.
- b. Dangerous machinery.

**a. Defective material—Losses resulting to distributees—
Nurture and training of children.**

The court instructs the jury that if they find for the plaintiff the damages are not limited to the losses sustained at the precise period of ——'s death, but may include prospective losses provided they are such as the jury believe from the evidence will result to his distributees as the proximate damages arising from the wrongful death, and the jury may take into consideration in estimating the pecuniary injury, the nurture, instruction, physical, moral and intellectual training which the children would have received from their father, and as a whole assess such damages as in the opinion of the jury will be fair and just, not exceeding in amount, \$——. *Richards v. Iron Works*, 56 W. Va. 519.

**b. Dangerous machinery—Injuries caused by—Duty of
master to give notice and instructions as to.**

The court instructs the jury that it is the duty of the master who sets a servant to work in a place of danger or with dangerous machinery or appliances, to give such notice and instructions as are reasonably required by the youth, inexperience or want of capacity of the servant; and failing to do so, the master is liable for the damage suffered through such failure. *Giebell v. Collins Co.*, 54 W. Va. 525.

4. AGAINST LANDLORDS.

**a. Defective plumbing—Injury to tenant caused by—
Condition of property before and after injury.**

The court instructs the jury that if they find that the defendant is liable to the plaintiff, that the measure of damages for the injury done is that amount that will compensate and make the plaintiff whole,—the difference in value of the property injured between that which was im-

mediately before the injury done, and that afterwards. *Michaelson v. Cautley*, 45 W. Va. 534.

5. AGAINST STEAMBOAT COMPANIES.

- a. **Loss of goods by sinking of barge—Contract price of sale of goods the measure of damages.**

The court instructs the jury that if they believe from the evidence that the plaintiff had sold the salt, the loss of which is in controversy, at a stipulated contract price, then that price should be the measure of damages so far as the value of the salt may be concerned. *Tompkins v. Kanawha Board*, 21 W. Va. 232.

6. AGAINST PERSON FOR TAKING PROPERTY WITHOUT OWNER'S CONSENT.

- a. **Possession of property taken—Damages to owner for taking property without his consent.**

The court instructs the jury that if they believe from the evidence that the plaintiff purchased of the defendant, the property in the declaration mentioned, and that he paid him for the same, and that said property was delivered to him, and afterwards came into the possession of the defendant, without the consent of the plaintiff, then the plaintiff is entitled to recover in this action so much damage as the jury may, from the evidence, be satisfied the plaintiff has sustained. *Haines v. Cochran*, 26 W. Va. 723.

7. AGAINST BRIDGE COMPANY.

- a. For injury to ferry franchise.
b. Same—Expenditure to be deducted.
c. Same.

a. Injury to ferry franchise—Amount of travel and revenue from—Inconveniences of the public.

The court instructs the jury that in forming their judgment of the damage to the said franchise of the plaintiff, when run within the limits authorized by the county court of —, and from landing which the plaintiff has the legal right to use, they are at liberty to consider, as evidence, such revenues as tend to show the amount of travel seeking passage across the river at that point, and the value of such travel to one holding the exclusive privilege to charge for transporting the same over the river by means of a ferry located as provided in the order of the county court; and on the other hand they are at liberty to consider the peculiar risk, disadvantages and inconveniences to the public, if any, from the location of the landings within the limits of the order of the county court as tending to affect or diminish the said travel, or the value of the same, to the said ferry-franchise so located. *Mason v. Bridge Co.*, 20 W. Va. 233.

b. Same — Expenditures to be deducted — Unsuitable grades for ferry landing.

The court instructs the jury that although they may find from the evidence that at the mouth of — grade and — road the condition of the river and bank is not at present suitable for a safe and convenient landing for the ferry of plaintiff, yet if they further find that said place, or within fifty yards thereof, and upon land owned or contracted for by the plaintiff can be made a safe and convenient landing by the expenditure of a certain amount of money, they must find for the plaintiff such damages as they may ascertain his ferry-franchise has sustained by reason of the erection and use by the public of the bridge of the defendant, to be credited by the cost of rendering said river and banks convenient and safe for the use of the ferry. *Mason v. Bridge Co.*, 20 W. Va. 236.

c. **Same.**

The court instructs the jury that if they believe from the evidence that the plaintiff has established a ferry over the — river at the points and between the limits prescribed in the order of the county court of — granting such license to said plaintiff to establish such ferry, and that said plaintiff owns or has contracted for the use of landings on both sides of the river within the limits prescribed in said order of the county court, then, even if they find that said plaintiff may have to expend further sums to make a proper channel for his boat across the river and suitable landings for his ferry boats on either side of the river on said land so owned or contracted for by him, they will only deduct such necessary expenditures from the amount assessed as damages to plaintiff's franchise by the erection and opening of defendant's bridge. *Mason v. Bridge Co.*, 20 W. Va. 237.

8. AGAINST BOOM COMPANIES.

a. **Slackening water power by causing sediment in stream —Rental value of property damaged—Statute of limitations.**

The court instructs the jury that if they believe from the evidence that, during the five years next preceding the institution of this suit, the erection, location or operation of said boom caused sand or sediment to settle in — river below the plaintiff's mill, and that such settling of the sand or sediment had the effect to reduce the power of the fall and dam at plaintiff's mill, and that by reason thereof the said mill was prevented from running during any part of said five years next preceding the institution of this suit, then the jury should find for the plaintiff such damages as he has sustained by reason of the stopping of the mill for said cause, and such damages should be a sum equivalent to the rental value of said mill for

the time, if any, that the mill was stopped by reason of said reduction of said power. *Pickens v. Boom Co.*, 58 W. Va. —.

9. AGAINST PULP MILL OWNERS.

a. Injury to water mill by construction of dams and gates.

The court instructs the jury that if they believe from the evidence that the defendant has, in the manner alleged in the declaration, unlawfully injured the property of the plaintiff, and that such damage and injury are of a permanent character, and affects the value of plaintiff's property, then they will find for the plaintiff a sufficient amount as will be a full compensation for such permanent injury. *Miller v. Pulp Co.*, 38 W. Va. 560.

[NOTE.—In addition to the foregoing, instructions embodying general principles relating to damages will be found under appropriate subjects, and in rare instances, in order to avoid disconnection of subject matter, instructions here given, are repeated.]

CHAPTER 23.

DEEDS.

- a. Competency to execute deeds—Mental capacity.
- b. Defective acknowledgments of married women.

a. Competency to execute deeds—Mental capacity—Intentions of grantor.

The court instructs the jury that the declarations made by — prior to his last sickness in regard to his inten-

tion to make disposition of a portion of his lands are to be considered by the jury, as bearing upon his capacity to make the deed of —, —, at the time of its execution. In other words, these declarations are not admitted to show that a continuing and contemplated purpose was then executed, but only to show, if the jury so find from the evidence in the case, that when the deed was executed, he had mental capacity to recollect a former intention, re-adopt and approve it, and carry it into effect. The jury is also instructed that these declarations of his purpose must not be received as conclusive of the question, whether they may, or may not, have been retracted or abandoned. This is a question for the jury to determine from the evidence. *Dingess v. Branson*, 14 W. Va. 104.

See also *Jarrett v. Jarrett*, 11 W. Va. 626.

b. Defective acknowledgments of married women.

The court instructs the jury that the deed executed by — to —, bearing date —, offered in evidence, and purporting to be also signed by —, and purporting to be also acknowledged by —, wife of the said —, is a good deed for the purpose of conveying the interest of — in the land therein mentioned. And the court also instructs the jury that if they believe from the evidence that the said —, at the time of the execution and acknowledgement of said deed, was the wife of the said —, then the said deed is not valid, so far as it purports to be her deed, and does not convey any interest she may have had in said land, and cannot operate against her or her grantees by way of estoppel. *Laidley v. Land Co.*, 30 W. Va. 509.

[NOTE.—This was under the statute requiring privy examinations of married women in acknowledgment of deeds.]

CHAPTER 24.**DETINUE.**

- a. Title to property.
- b. Preponderance of evidence.

a. Title to property.

The court instructs the jury that if they believe from the evidence that the title to the property was in — (another than plaintiff) at the time he delivered the same to the defendant, they must find for the defendant. *Davis v. Webb*, 46 W. Va. 9.

b. Preponderance of evidence.

The court instructs the jury that in order to recover, the plaintiff must have a preponderance of testimony. *Davis v. Webb*, 46 W. Va. 9.

CHAPTER 25.**DRUGS AND DRUGGISTS.**

- a. Negligent sale of—How sale may take place—Injury resulting from.
- b. What druggist's license not required for sale of.
- c. Proximate cause of injury—Definition of.
- d. Contributory negligence—Definition of.

a. Negligent sale of drugs—How sale may take place—Injury resulting from.

The court instructs the jury that in law a sale may take place without payment of money, and that if they

believe from the evidence that the salts in question was sent for by — and at his request through his agent, and that the salt petre was sold to —, the agent of the plaintiff, by the defendants, when he demanded of them salts, and that they received payment therefor, that then it is immaterial whether the plaintiff ever paid —, his agent, for them or not, so far as this enquiry is concerned. *Peters v. Johnson & Jackson*, 50 W. Va. 652.

b. What druggists' license not required for sale of.

The court instructs the jury that — is not one of the poisons or drugs included in either schedule "A" or schedule "B" of section IX of chapter 150 of the Code of West Virginia; and that there is no law prohibiting the defendants from keeping, exposing for sale and selling the same, without having license as druggists or pharmacists *Peters v. Johnson & Jackson*, 50 W. Va. 652.

c. Proximate cause of injury—Definition of.

The jury are further instructed that the proximate cause of an injury is the last negligent act contributing thereto, and without which such injury would not have resulted; and if the jury believe from the evidence in this case that the last negligent act contributing to the injury complained of and without which the said injury would not have resulted, was the act of the plaintiff, then, the plaintiff cannot recover, and the jury must find a verdict for the defendants. *Peters v. Johnson & Jackson*, 50 W. Va. 652.

d. Contributory negligence—Definition of.

The jury are further instructed that it is a settled rule of the common law that for injuries negligently inflicted upon one person by another there can be no recovery of damages if the injured person by his own negligence proximately contributed to the injury. Contributory

negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, and contributing to the injury as a proximate cause thereof without which the injury would not have occurred. If the jury believe from the evidence that the plaintiff was guilty of contributory negligence in not using ordinary care in the taking of the drug, which he took by mistake for salts, then he is not entitled to recover from the defendants, even though the said ——— were guilty of negligence in selling him the said drug, and though they believe that said ——— did sell him the said drug, and the jury should find for the defendants. *Peters v. Johnson v. Jackson*, 50 W. Va. 652.

CHAPTER 26.

DURESS.

- a. Excessive rates—Offsets—Recovery of excessive rates paid under duress.
- b. Same—Duress defined.

a. Excessive rates—Off-sets—Recovery of excessive rates paid under duress.

The court instructs the jury that if they believe from the evidence that the ——— railroad company was an incorporated company, and its road did not exceed ——— miles in length, and that said road was operated by steam power at the respective dates of the items charged in the defendant's specifications of offsets filed in this cause, then the legal rates of transportation of ——— over the line of said road was not exceeding ——— cents per ton per mile, and the defendant is entitled to recover any excess over the said rate paid for the transportation of

the — in the said specifications of off-sets mentioned over the line of said road by the defendant to the plaintiff, if such payments were made under duress and not voluntarily. *Transportation Co. v. Sweetzer*, 25 W. Va. 439.

b. Same—Duress defined.

The court instructs the jury that if they believe from the evidence that the defendant voluntarily made the payment in his accounts of sets-off mentioned, with full knowledge, or means of knowledge, of all the facts relating thereto, and without duress of his person or goods, then he cannot recover on his said sets-off; that duress is any improper means brought to bear upon a party whereby he is not a free agent, and if the jury believe that the defendant was placed in such a condition by the plaintiff that he could not get his goods to market, or get them out of the plaintiff's possession without paying for freight thereon at a rate exceeding — cents per ton per mile over the line of the said railroad company, then that constituted such duress of goods as would entitle the defendant to recover upon his said sets-off, provided the jury believe from all the evidence that the plaintiff did charge the defendant for said transportation a rate exceeding — cents per ton per mile as charged in said sets-off, and that the plaintiff was operating by steam power the said — railroad, and that said railroad does not exceed — miles in length. *Transportation Co. v. Sweetzer*, 25 W. Va. 440.

CHAPTER 27.

EJECTMENT.

- a. Strength of title — Plaintiff must recover on strength of his own title.
- b. Defeat of plaintiff's claim by showing title in another.
- c. Identity of land—Necessity for establishing.
- d. Source of title—Conflicting titles arising from same source—Priority of recordation of deeds.
- e. Superior title to, and adverse possession of a portion of the land.
- f. Color of title—Character of deed which gives color of title.
- g. Same—Not necessary that evidence of be in writing.
- h. Quantity of land—Not necessary to be considered when conveyance is made by metes and bounds.
- i. Boundary lines—Marked lines and ancient fences as elements of proof.
- j. Same—Natural boundaries.
- k. Defective acknowledgments of married women.
- l. Life estate — Termination of — Right of way — Statute of limitations.
- m. Taxes—Duty of land owner to have lands assessed for.
- n. Same—How coterminous tracts belonging to same person may be assessed.
- o. Forfeiture—How deemed in law.
- p. Equity of redemption—Purchase of land forfeited by creditor.
- q. Same—Defeat of tax-purchaser's title—Payment of taxes by creditor.

- a. **Strength of title**—Plaintiff must recover on the strength of his own title.

The court instructs the jury that the plaintiff, in an action of ejectment, must recover upon the strength of his own title, and not upon the weakness of defendant's title. *Coal Co. v. Howell*, 36 W. Va. 509.

- b. **Defeat of plaintiffs claim by showing title in another.**

The court instructs the jury that in a trial of an action of ejectment it is not necessary for the defendant to show that he has any title to the land in controversy, but can defeat the plaintiff's claim by showing a title to the land in controversy in some other person than the plaintiff. *Robinson v. Lowe*, 56 W. Va. 311.

- c. **Identity of land—Necessity for establishing.**

The court instructs the jury that before plaintiff can recover, he must prove the identity of the land claimed by him and if the identity of the land is not proved by the plaintiff to the satisfaction of the jury, they must find for the defendant. *Coal Co. v. Howell*, 36 W. Va. 509.

- d. **Source of title—Conflicting titles arising from same source—Priority of recordation of deeds.**

The court instructs the jury that if they believe from the evidence that the deed from A to B, under which the defendant claims, covers the land in controversy, and if they further believe from the evidence that the deed from A to C, under which the plaintiff claims, also covers the land in controversy, and if they further believe from the evidence that the deed to C was first admitted to record in the proper office for recording said deeds, then the said deed from A to C vested in said C a valid title to said land in controversy unless the jury believe from the evidence that the said C had notice that the said deed to B, which is older in date than the deed to C, covered the land in con-

troversy and that B claimed title thereto. *Congrove v. Burdett*, 28 W. Va. 222.

e. Superior title to, and adverse possession of a portion of the land.

The court instructs the jury that if they believe from the evidence that the defendant, and those under whom he claims, entered upon and took possession of any part of the land in controversy, claiming under color or claim of title by deed or other writing, then the defendant, and those under whom he claims, thereby acquired adversary possession of such land to the extent of the boundaries embraced by such deed or other writing, unless the jury believe from the evidence that the plaintiff or those under whom he claims, had the better title and had actual adverse possession of the part of the land embraced by the deed or other writing under which the defendant, or those under whom he claims, entered and took possession of the said land in controversy. *Congrove v. Burdett*, 28 W. Va. 223.

f. Color of title—Character of deed which gives color of title.

The court instructs the jury that a deed in writing which purports to convey lands by metes and bounds and pass a title thereto, is color of title, no matter in what its invalidity may consist. *Robinson v. Lowe*, 50 W. Va. 82.

g. Same—Not necessary that evidence of be in writing.

The court instructs the jury that color or claim of title which may be sufficient to establish title to land by adverse possession, may be under a good or bad, legal or equitable title; that it is not indispensable that the claim of title should be in the form of a deed or any other writing; that the claim, from its nature or character, may be

wholly independent of any written evidence; and if a party have a deed or other writing with a specified boundary, the possession which he may take and hold is not necessarily restricted or confined to what he shall prove to be within the precise boundary of such deed or writing; he may take and hold actual possession of land outside of his true boundary. *Congrove v. Burdett*, 28 W. Va. 223.

h. Quantity of land not to be considered when conveyance is made by metes and bounds.

The court instructs the jury that the fact that the deed from — to — conveys by metes bounds to said — more than — acres should not be taken into consideration by you in determining the matters in controversy in this action. *Robinson v. Lowe*, 50 W. Va. 83.

i. Boundary lines—Marked lines and ancient fences elements of proof.

The court instructs the jury that marked lines and ancient fences are elements of proof to be considered when applicable in all questions of boundary, and in this case if the jury believe from the evidence that there was an ancient fence at or near the — stake called for as corner of the — acre tract of land owned by —, which marked his boundary line at that point, the line of said fence as an element of proof, is entitled to consideration in determining the true line of the land in controversy, and the marked lines on the land in controversy are entitled to more weight than the marked lines to adjacent tracks. *Maxwell v. Kent*, 49 W. Va. 548.

j. Same—Natural boundary lines.

The court instructs the jury that in ascertaining the boundaries of a tract of land described in a grant or deed, natural boundaries or lines of marked trees will be estab-

lished in preference to mere course and distance; and where there are no natural boundaries and lines of marked trees to be relied on to establish such boundaries, the courses and distances called for in such deed or grant will control. *Congrove v. Burdett*, 28 W. Va. 222.

k. Defective acknowledgment of a married woman.

The court instructs the jury that the deed executed by — to —, offered in evidence by the plaintiff, and purporting to be also signed and acknowledged by —, wife of the said —, is a good deed for the purpose of conveying the interests of — in the lands therein mentioned; and the court also instructs the jury that if they find from the evidence that the said —, at the time of the execution and acknowledgement of said deed, was the wife of the said —, then the said deed is not valid, so far as it purports to be her deed, and does not convey any interests she may have had in said land, and cannot operate against her or her grantees by way of estoppel. *Laidley v. Land Co.*, 30 W. Va. 508.

l. Life-estate—Termination of—Right of way—Statute of limitations.

The court instructs the jury that if the defendant had only received a conveyance of the right of a way over the land in controversy from —, and the said — was only seized of a life-estate in said land by virtue of his marriage, then the title of the defendant ceases at the termination of said life-estate. And the statute of limitations will not commence to run in favor of the defendant until after the said life-estate terminates. *Jones v. Railroad Co.*, 14 W. Va. 518.

m. Taxes—Duty of land-owner to have lands assessed for—When failure to have assessments made and taxes paid works forfeiture.

The court instructs the jury that it shall be the duty

of every owner of land to have it entered on the land books of the county in which it or a part of it is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five consecutive years after the year 1869 the owner of any tract of land shall not have been charged on such books with state tax on said land, then the land shall be forfeited and the title thereto vested in the state. If the evidence in this case shows that the land claimed by the plaintiff was not for any five successive years after the year 1869, charged on the land books of the county in which it was situated and the plaintiff or those under whom he claims did not cause themselves to be charged with taxes thereon and pay the same, then the said land or lands were forfeited and the title thereto vested in the state and the plaintiff cannot recover in this suit and the jury must find for the defendant. *Davis v. Living*, 50 W. Va. 433.

[NOTE.—While forfeiture before the suit commences defeats the plaintiff's suit, forfeiture before the trial does likewise.]

[NOTE.—For other instructions concerning forfeiture, for non-payment of taxes on which *quasi* approval seem to have been placed. See *Davis v. Living*, 50 W. Va. 432, 433, 434.]

n. Same—How coterminous tracts belonging to same party may be assessed.

The court instructs the jury that if a person has his land charged upon the land books in a large tract that covers all his smaller tracts, or any of his smaller tracts, it is not necessary for him to have it charged to him in the small tracts, and no forfeiture can accrue to those small tracts by reason of their being so charged as small tracts, if they are included in the large tracts. In other

words, coterminous tracts of land belonging to the same person for the assessment and payment of taxes are the same as one tract. *Maxwell v. Cunningham*, 50 W. Va. 301.

o. Forfeitures—How deemed in law—What party claiming benefit of forfeiture must prove.

The court instructs the jury that forfeitures are deemed odious in law and will never be presumed, but must be strictly proved by the party relying on the same. And before the defendant can have the benefits of the forfeiture claimed by him for a failure of the plaintiff, or those under whom he claims, to have had the land in controversy placed upon the land books in — county and pay the taxes thereon for five successive years after the year —, the defendant must clearly prove that the said land, or any part thereof, in controversy has not been upon the land books for those years, neither in large tracts nor small ones. *Maxwell v. Cunningham*, 50 W. Va. 301.

p. Equity of redemption—Purchase by creditors.

The court instructs the jury that when —, the debtor, executed the deed to —, he conveyed nothing but the equity of redemption, or right to pay off the deed of trust and prevent the sale of the land conveyed therein; and if they believe from the evidence that the — acres of land was sold by —, trustee, and purchased by —, the creditor, that such sale vested in —, the creditor, the legal title to said land, and they should find for the plaintiff. *Carrell v. Mitchell*, 37 W. Va. 141.

q. Same—Defeat of tax purchasers title—Payment of taxes by creditor.

The court instructs the jury that if they believe from the evidence that — was a creditor of —, and as such,

paid the taxes on the land in controversy for the years for which it was returned delinquent, then the same was improperly returned delinquent, and the tax-deed conferred no title on the purchaser at the tax sale. *Carrell v. Mitchell*, 37 W. Va. 140.

CHAPTER 28.

ELECTRICAL COMPANIES.

- a. Insulation of wires—Duty of company as to.
 - b. Liability of company for injuries resulting from improper insulation.
 - c. Same.
 - d. Same—Live wires—Defective insulation.
 - e. Cause of injury—Preponderance of evidence.
 - f. Cause of injury other than that alleged.
 - g. Same.
 - h. Injuries caused by other than the natural results of negligence of defendant.
 - i. As to liability for injury had injury not been fatal.
 - j. Unavoidable accidents—Violation of duty.
 - k. Anticipated accidents—What to be considered.
 - l. Proximate cause of injury—Preponderance of evidence.
 - m. Preponderance of evidence.
 - n. Same—What must be established by.
 - o. Utmost caution required of company—Definition of.
-
- a. Insulation of wires—Duty of company as to—Requirements as to—Inspection of wires.

The court instructs the jury that it was the duty of the defendant to not only protect any portion or portions of

its wires in close proximity to the — end of the balcony mentioned in evidence that may be exposed, by proper insulation, so that persons coming in contact therewith in the performance of their work would not be injured, but it was also the duty of the defendant, by proper inspection from time to time, to see that said insulation was kept in a proper condition. *Thomas v. Electrical Co.*, 54 W. Va. 398.

b. Liability of company for injuries resulting from improper insulation.

The court instructs the jury that if they believe from the evidence that — was attempting to release the banner on the — side of the balcony mentioned in evidence and leaned over the balcony in such a way that he was brought in close proximity to the wire of the defendant, and that by some accident his hand came in contact with said wire, and that said wire at the point of contact was improperly insulated, and that he thereby received from said wire the shock of electricity which caused his death, and further believe that he received such shock of electricity by reason of the failure of the defendant to properly insulate its wires at the point where the deceased came in contact therewith, then the jury should find a verdict for the plaintiff. *Thomas v. Electrical Co.*, 54 W. Va. 401.

c. Same.

The court instructs the jury that if they believe from the evidence that one of the wires of the defendant in close proximity to the — end of the balcony mentioned in evidence was not properly insulated, and that deceased was attempting to release the banner on the — end of said balcony and leaned over said balcony and without negligence on his part was thereby brought

in contact with said wire where it was improperly insulated, and by reason of such contact received a shock of electricity from said wire which caused his death, then the jury should find a verdict for the plaintiff. *Thomas v. Electrical Co.*, 54 W. Va. 402.

d. Same—Live wires—Defective insulation.

The court instructs the jury that even if they believe from the evidence that deceased knew of the presence of the wire of the defendant company near the balcony mentioned in evidence, and further believe that when in the act of releasing or attempting to release the banner on the ——— end of said balcony he was brought in such close proximity to such wire that he took hold of the same to support himself, this fact will not excuse the defendant from liability if the jury believe from the evidence that deceased did not know that it was dangerous to touch said wire and that he, in taking hold of said wire received such a shock of electricity by coming in contact therewith that his death was caused thereby; and provided further that the jury believe that such shock was caused by defective or improper insulation of said wire at the point where deceased came in contact with it. *Thomas v. Electrical Co.*, 54 W. Va. 402.

e. Cause of injury—Preponderance of evidence.

The court instructs the jury that unless the plaintiff prove by a preponderance of the evidence that the injury complained of occurred by contact with the wire or one of the wires of the ——— company, described in the evidence as being ——— of the ——— building, then it is the duty of the jury to find a verdict for the defendant. *Thomas v. Electrical Co.*, 54 W. Va. 403.

f. Cause of injury other than that alleged.

The court instructs the jury that if you believe from

the evidence that the deceased was killed by placing his hand on the messenger wire, on the north west side of the balcony, and was not killed by contact with the wires of the defendant company, then you must find for the defendant. *Thomas v. Electrical Co.*, 54 W. Va. 403.

g. Same.

The court instructs the jury that if you believe from the evidence that the injury sustained by ——— was caused by contact with the messenger wires of the ——— Telegraph Company or by a current of electricity coming from the tin or sheet iron roof of the balcony, then your verdict should be for the defendant. *Thomas v. Electrical Co.*, 54 W. Va. 403.

h. Injuries caused by other than the natural results of negligence of defendant.

The court instructs the jury, that although they may believe from the evidence that the injury complained of was occasioned by the negligent acts of the defendant in failing to insulate its wires and its failure to inspect the same, still, if you further believe from the evidence that said injury was not the natural result of the negligent acts of the defendant in failing to insulate its wires, and in its failure to inspect the same, and could not have been reasonably foreseen or expected to result from the conduct of the defendant in regard to its failure to insulate its wires, and its failure to inspect the same, then the defendant would not be liable. *Thomas v. Electrical Co.*, 54 W. Va. 403.

i. As to liability for injury had injury not been fatal.

The court instructs the jury that the ——— electrical company is only liable in case it would have been liable to deceased if the injuries to him had not resulted in

death. Therefore, if the jury believe from the evidence that ———, either by his own negligence, or the defendant's want of negligence, would not have been entitled to recover in case he had survived the injury, they are instructed to find for the defendant. *Thomas v. Electrical Co.*, 54 W. Va. 403.

j. Unavoidable accident—Violation of duty.

The court instructs the jury that where the circumstances of an accident indicate that it may have been unavoidable notwithstanding reasonable and proper care, the plaintiff charging negligence cannot recover without showing that the defendant has violated a duty incumbent upon it from which the injury followed in natural sequence. *Snyder v. Electrical Co.*, 43 W. Va. 671.

k. Anticipated accidents—What to be considered.

The court instructs the jury that the defendant in erecting and maintaining its wires, was only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its past experience and the experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business. *Snyder v. Electrical Co.*, 43 W. Va. 672.

l. Proximate cause of injury—Preponderance of evidence.

The court instructs the jury that in case the plaintiff bases his claim for damages upon alleged negligence and carelessness on the part of the defendant, and that being so, that the burden is upon the plaintiff to establish such negligence first and then to prove that such negligence was the proximate cause of the injury; and if the

plaintiff fail to establish these facts by a preponderance of the evidence, it is the duty of the jury to find a verdict for the defendant. *Thomas v. Electrical Co.*, 54 W. Va. 403.

m. Preponderance of evidence—How determined.

The court instructs the jury that the preponderance of the evidence in a case, is not alone determined by the number of witnesses testifying to a particular fact or state of facts, in determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying, and the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial, and from these circumstances determine upon which side is the weight or preponderance of the evidence. *Thomas v. Electrical Co.*, 54 W. Va. 403.

n.—Same—What must be established by.

The court instructs the jury that before they can render a verdict for the plaintiff, the plaintiff must prove by a preponderance of evidence, that the injury complained of was sustained by ——— by reason of the wire described in the evidence not being properly insulated and that this lack of proper insulation was due to the negligence and carelessness of the defendant; and unless plaintiff proves these facts by a preponderance of the evidence, the jury should find a verdict for the defendant. *Thomas v. Electrical Co.*, 54 W. Va. 403.

o. Utmost caution required of company—Definition of.

The court instructs the jury that the care and caution

that is required in the management and control of electricity does not reach so far as to require precautions that are extraordinary and impracticable. Even if the utmost caution is to be required, that means only the caution which is practicable and not that which is simply conceivable. *Thomas v. Electrical Co.*, 54 W. Va. 403.

CHAPTER 29.

EXEMPTIONS.

a. Party leaving the state—Intention as to change of residence.

The court instructs the jury that if they believe from the evidence that the plaintiff left the state with the intention of changing his residence to ———, (another state), and that while going out of this state pursuant to such intention, his property was attached and sold, as stated in the evidence, he was not entitled to claim, as against such levy, an exemption as a husband and parent residing in this state, and in such case the jury should find for the defendant. *State &c. v. Allen*, 48 W. Va. 155.

CHAPTER 30.

EXPLOSIONS.

**a. Injury to property caused by the explosion of a boiler
—Presumption that person in performance of lawful
act has done his duty.**

The court instructs the jury that they cannot infer negligence from the mere explosion of the boiler. The

plaintiff must prove in addition to such explosion, such facts and circumstances as will logically raise an inference of negligence on the part of the defendant before they can find for the plaintiff. The presumption of law is, that persons in the performance of a lawful act have done their duty, and this presumption continues until the contrary is proven. *Veith v. Salt Co.*, 51 W. Va. 100.

CHAPTER 31.

EXPLOSIVES.

- a. Injuries caused by explosion of dynamite.
- b. Admissions of defendant—Negligence.

a. Injuries caused by the explosion of dynamite.

The court instructs the jury that if they believe from the evidence that the plaintiff was injured by the explosion of dynamite, as complained of in the declaration, and that the negligence of the defendant ——— was the proximate cause of the injury received by the plaintiff, then they must find a verdict for the plaintiff. *Schwartz v. Shull*, 45 W. Va. 411.

b. Admissions of defendant—Negligence.

The court instructs the jury that even if they believe from the evidence that the defendant, after the explosion, and injury of the plaintiff, stated or admitted that he was to blame in the matter, or that it was his fault, yet that does not entitle the plaintiff to recover unless the evidence in the case before the jury, including such statement of said defendant, if the jury believe that it was made, shows that the defendant was negligent, and that his negligence was the direct and proximate cause of plaintiff's injuries. *Schwartz v. Shull*, 45 W. Va. 410.

CHAPTER 32.

FALSE ARREST AND IMPRISONMENT.

- a. Arrest of passenger on a railroad train by civil officer.
 - b. Arrest of passenger by conductor of train.
 - c. Same—Scope of authority of conductor.
 - d. Same—Definition of scope of authority.
 - e. Same.
 - f. Arrest of person engaged in an unlawful combination.
-
- a. Arrest of passenger on a railroad train by a civil officer—Same—While passenger armed with dangerous or unlawful weapons.

The court instructs the jury that if they believe from the evidence that the plaintiff, while armed with dangerous or unlawful weapons, was on the train of the defendant, within the corporate limits of ———, and it became known to the police of that town that he was so unlawfully armed, the police had the right to arrest him on the cars, and take him therefrom, and the defendant, the ——— railway company, would not be liable for such arrest. *Claiborne v. Railway Co.*, 46 W. Va. 369.

- b. Arrest of passenger by conductor of train—Acts of conductor, acts of railroad company.

The court instructs the jury that if they believe from the evidence that the plaintiff without just cause was arrested after he became a passenger on one of the defendant's trains, and during the time that he was on such train, either by the conductor in charge of said train or by the policeman, ———, by order of the said conductor,

that the act of the conductor, or of the said policeman acting under the orders of the said conductor, was the act of the defendant. *Gillingham v. Railroad Co.*, 35 W. Va. 602.

c. Same—Scope of authority of conductor.

The court instructs the jury that the plaintiff cannot recover in this case unless the acts done by the conductor in causing the arrest of the plaintiff were within the scope of his employment by the defendant railroad company; and such acts, to be within the scope of his employment, must be such as he would be usually and naturally called upon to do while discharging his duties as a railroad conductor in and about the business of the defendant railroad company. *Gillingham v. Railroad Co.*, 35 W. Va. 603.

d. Same—Scope of authority defined.

The court instructs the jury that it is not sufficient that the acts complained of were done during the time of the conductor's employment by the railroad company, or at the place where his duties called him to be. There must be something more, something which he was authorized by the defendant company to do, or which he did do while acting as such conductor, in the scope of his duties and employment. *Gillingham v. Railroad Co.*, 35 W. Va. 603.

e. Same.

The court instructs the jury that unless the act done by the conductor in causing the arrest of the plaintiff was authorized by the railroad company, or was properly and legitimately within the scope of his employment, you must find for the defendant. *Gillingham v. Railroad Co.*, 35 W. Va. 602.

f. Arrest of person by persons engaged in unlawful combination.

The court instructs the jury that if they believe from the evidence in this case that ———, ———, ———, ———, and ——— combined for an unlawful purpose, and in the execution of that purpose as a consequence of that unlawful combination, the plaintiff was arrested without probable cause, and imprisoned by any of the defendants, the law is for the plaintiff, with the plea of not guilty, and they must find for him such damages as they, in their discretion, may deem proper, not exceeding the amount laid in the writ. *Bloss v. Plymale*, 3 W. Va. 399.

CHAPTER 33.

FALSE REPRESENTATIONS.

a. Avoidance of contracts founded on—Fraudulent intent.

The court instructs the jury that if a seller, in order to induce a sale, makes a false representation as to any material fact, by which the purchaser is mislead to his injury, and in which the purchaser is presumed to have trusted to the seller, then the contract founded on such representation is void, whether the seller knew the representations to be false at the time they were made or not, and whether made with a fraudulent intent or not. *Hood v. Block*, 29 W. Va. 250.

CHAPTER 34.**FERRIES.****a. Right of county court to authorize in incorporated towns.**

The court instructs the jury that if they find from the evidence that the plaintiff, ———, has been authorized by the county court of ——— county, to establish a ferry from the mouth of ——— grade and ——— road, or within fifty yards thereof, upon his own land or upon land contracted for, to ——— street, ———, or within twenty yards thereof, that said roads and streets are public highways, and the grant from the county court operates to confer upon the plaintiff the right to land his boat and take passengers from the foot of ——— street without showing to the jury that he first obtained the consent of the authorities of ———. *Mason v. Bridge Co.*, 20 W. Va. 234.

CHAPTER 35.**FLOATABLE STREAMS.**

- a. What deemed a floatable stream—Obstructions to.
- b. Same—Natural commercial capacity of stream—Non-user of stream.
- c. How navigability of stream determined.
- d. Criminal liability for obstructing floatable streams.

a. What deemed a floatable stream—Obstructions to.

The court instructs the jury that it is a question for the jury to determine from the evidence whether ———

river, at the point at which the —— complained of is located, is floatable; and if the jury believe from the evidence that said river is capable of being used to float rafts, boats, and other timber in times of rises only, then, before they can find the defendant guilty, it must be proven to the jury by the evidence, beyond all reasonable doubt, that the dam complained of was so constructed and maintained as not to permit boats, rafts, and other timber to pass without unavoidable delay, at times of such rises as made the river so floatable. *State v. Boom Co.*, 41 W. Va. 800.

b. Same—Natural commercial capacity of stream—Non-user of stream.

The court instructs the jury that if they believe from the evidence that —— creek is, and has always been, by reason of its natural capacity, navigable for floating lumber, logs, and other commercial goods, the right of the public to use the same for such purpose cannot be lost or forfeited by reason of non-user of it, or maintaining an obstruction thereto, for any length of time, and under such circumstances the plaintiff could not acquire a right to maintain a dam or other obstruction to the public use of said stream. *Gaston v. Mace*, 33 W. Va. 18.

c. How navigability of stream determined.

The court instructs the jury that in determining the navigability of —— creek, it is the valuable, more than the continued capacity that is to be considered. The real question is, can it be made a valuable and beneficial aid to the public in getting the products of the country to market? *Gaston v. Mace*, 33 W. Va. 18.

d. Criminal liability of boom owner for obstructing floatable streams.

The court instructs the jury that it is a question for

the jury to determine from the evidence whether ——— river at the point at which the dam complained of is located, is floatable; and if the jury believe from the evidence that said river is capable of being used to float rafts, boats and other timber in time of rises only, then, before they can find the defendant guilty, it must be proven to the jury by the evidence, beyond all reasonable doubt, that the dam complained of was so constructed and maintained as not to permit boats, rafts, and other timber to pass without unavoidable delay, at the times of such rises as made the said river so floatable. *State v. Boom Co.*, 41 W. Va. 800.

CHAPTER 36.

FORGED INSTRUMENTS—FORGERY.

- a. Definition of forgery—Intent to defraud—Alteration of instrument after signature.
 - b. Delay in giving notification of forgery—Demand for repayment.
 - c. Knowledge and good faith of party discounting forged instrument.
 - d. Effect of negotiations with payee for payment of forged instrument.
-
- a. **Forgery—Definition of—Intent to defraud—Alteration of instrument after signature.**

The court instructs the jury that the offense of forgery consists in the false making or altering of a written instrument, to the prejudice of another's rights and the intent to defraud; that in the case at bar the only two questions before the jury are: 1st, did the defendant alter the instrument after it was signed by ———, and, 2nd, was

such alteration, (if made by the defendant), done with intent to defraud and that the question of intent need not be enquired into by them unless they first believe from the evidence, beyond a reasonable doubt, that the defendant altered the said instrument after it was signed by ———, and if the evidence leaves a reasonable doubt in their minds as to whether the said defendant altered the said instrument after it was so signed by the said ———, they must find the defendant not guilty. *State v. Pine*, 56 W. Va. 10.

b. Delay in giving notification of forgery—Demand for re-payment.

The court instructs the jury that if they believe from the evidence that the plaintiff on the ——— day of ———, 18—, knew the forgery of his name to the note mentioned as paid by mistake by him on ——— —, 18—, and that the plaintiff failed to notify the defendant of said forgery till the fifteenth day of April following and to demand a re-payment of the money, that then by reason of his delay he is not entitled to recover in this suit. *Johnston v. Bank*, 27 W. Va. 346.

c. Knowledge and good faith of person discovering forged instrument.

The court instructs the jury that if they believe from the evidence that the defendant discounted the note in this suit mentioned and received the same in his regular course of business, in good faith and for value, and did not know or have any reason to suspect that the plaintiffs' name as maker was forged to said note when the defendant discounted the same, and that said note was paid by plaintiff or by his agent, to the defendant on, or about April 2, 18—, that then and in that event the plaintiff is not entitled to demand back the money so paid, and can-

not recover in this suit. *Johnston v. Bank*, 27 W. Va. 346.

d. Effect of negotiations with payee for payment of forged note without the knowledge or consent of holder of same.

The court instructs the jury that if they believe from the evidence that after the plaintiff discovered that his name to said note in this suit as maker had been forged by the payee, and that the plaintiff without the knowledge or consent of the defendant entered into negotiations with the said payee, for the re-payment of the money paid by the plaintiff to the defendant on said note and without the knowledge or consent of the defendant gave time to said payee to arrange for and make said re-payment to the plaintiff, that then and in that event the plaintiff must be held as having adopted said forged note as his own and said payee as his debtor and that he must look to said payee for re-payment, and is therefore, not entitled to recover in this suit. *Johnston v. Bank*, 27 W. Va. 346.

CHAPTER 37.

GIFTS.

- a. Gifts causa mortis—What necessary to constitute.
- b. Place of making gift—Residence of donor and donee

a. Gifts causa mortis—What necessary to constitute.

The court instructs the jury that if they believe from the evidence that the ——— money here in controversy was delivered by ———, (the donor), to ——— for his daughter as a voluntary gift from said ———, (the

donor), to said daughter, then so long as said money remained in the hands of ———, said ———, (the donor), had the right to revoke the gift and reclaim the money from ———, and if the said ———, (the donor), died while the said money still remained in the possession of the said ———, and not yet delivered by him to his daughter, the authority to deliver was thereby revoked, and the said money is the property of the plaintiff, the administrator of the said ———, (the donor). *Dickeshied v. Bank*, 28 W. Va. 352.

b. Place of gift—Residence of donor and donee.

The court instructs the jury that if they believe from the evidence that ———, (the donor), gave the ——— money here in controversy to ——— for his daughter while said ———, (the donor), and ——— resided together, and that said ———, or his daughter, did not have possession of the said money elsewhere than at such residence until after the death of ———, (the donor), then such gift was not valid, and the jury should find for the plaintiff, the administrator of said ———, (the donor). *Dickeshied v. Bank*, 28 W. Va. 351.

CHAPTER 38.**HOMICIDE.**

- I. MURDER — ITS ELEMENTS AND ITS INCIDENTS.
- II. MANSLAUGHTER — VOLUNTARY AND INVOLUNTARY.
- III. EXCUSE AND JUSTIFICATION.
- IV. DEGREES OF OFFENSES AND PUNISHMENTS IMPOSED.

- I. MURDER — ITS ELEMENTS AND ITS INCIDENTS.

- a. Necessity for establishing homicide.
- b. Same—Whether murder or suicide.
- c. Material allegations of indictment—Necessity for proving.
- d. Murder in the first degree—Proof required to convict of.
- e. How murder in second degree elevated to murder in first degree.
- f. Same.
- g. Intent to kill—Presumption as to.
- h. Same—Extenuating circumstances.
- i. Implied malice—When malice may be inferred. *ffl*
- j. Same—Implied willfulness, deliberation and premeditation.
- k. Duration of malice.
- l. Provoking the affray—Seeking deadly combat.
- m. Assault brought on by third party—Intoxication of accused.
- n. Same—Character of assault made by deceased.

- o. Assault on another in addition to that made upon deceased.
- p. Conspiracy—Murder resulting from.
- q. Same—Intent of and acts done by conspirators.

a. Necessity for establishing homicide.

The court instructs the jury that if they entertain any reasonable doubt from the evidence as to whether —— was murdered or not, they should find the defendant not guilty. *State v. Ice*, 34 W. Va. 251.

b. Whether murder or suicide.

The court instructs the jury that unless they believe beyond a reasonable doubt that the prisoner killed the deceased, and that the deceased did not kill herself, then the jury must acquit the prisoner. *State v. Kerns*, 47 W. Va. 270.

c. Material allegations of indictment—Necessity for proving.

The court instructs the jury that the burden of proof rests upon the prosecution to make out and prove to the satisfaction of the jury, beyond all reasonable doubt, every material allegation in the indictment, and unless that has been done the jury should find the defendant not guilty. *State v. Johnson & Devinney*, 49 W. Va. 692.

d. Murder in the first degree—Proof required to convict of.

The court instructs the jury that before they can find the defendant guilty of murder in the first degree they must believe from the evidence that the killing of —— was willful, deliberate and premeditated and with malice aforethought, and was the result of cool, deliberate judgment and previous malignity of heart, without justifica-

tion, excuse, palliation or alleviation. *State v. Manns*, 48 W. Va. 485.

e. How murder in the second degree elevated to murder in the first degree.

The court instructs the jury that where a homicide is proved the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree she must establish the characteristics of that crime, and if the prisoner would reduce it to manslaughter, the burden is on him. *State v. Cain*, 20 W. Va. 709.

f. Same.

The court instructs the jury that if they believe from the evidence that ——— came to his death by a pistol shot wound at the hands of the prisoner, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime; and if the prisoner would reduce it to manslaughter, the burden of proof rests upon the prisoner. *State v. Hobbs*, 37 W. Va. 819.

g. Intent to kill—Presumption as to.

The court instructs the jury that a man is presumed to intend that which he does or which is the immediate or necessary consequence of his act. *State v. Dickey*, 48 W. Va. 326.

h. Same—Extenuating circumstances.

The court instructs the jury that a man is presumed to intend that which he does or which is the immediate or necessary consequence of his own act, and if the prisoner, with a deadly weapon in his possession, without any or upon very slight provocation, gave the deceased a mortal wound, he, the prisoner, is *prima facie*

guilty of willful, deliberate and premeditated killing, and the necessity rests upon him of showing extenuating circumstances and unless he proves such extenuating circumstances, or the circumstances appear from the case made by the state, he is guilty of murder in the first degree. *State v. Davis*, 52 W. Va. 225.

(See the *Cain case*, 20 W. Va. 679.)

i. Implied malice—When malice may be inferred.

The court instructs the jury that to convict one of murder it is not necessary that malice should exist in the heart of the accused against the deceased. If the accused was guilty of striking, with a deadly weapon, another, and of killing him, the intent, the malice and willfulness, deliberation and premeditation, may be inferred from the act; and such malice may not be directed against any particular person, but such as shows a heart regardless of social duty and fatally bent on mischief. *State v. Welch*, 36 W. Va. 697.

j. Same—Implied willfulness, deliberation and premeditation.

The court instructs the jury that to convict one of murder it is not necessary that malice should exist in the heart of the accused against the deceased. If the jury believe from the evidence that the prisoner was guilty of cutting, with a deadly weapon, the deceased, and of killing her, the intent, the malice and the willfulness, deliberation and premeditation may be inferred from the act, and such malice may not be directed against any particular person, but such as shows a heart regardless of social duty and fatally bent on mischief. *State v. Tucker*, 52 W. Va. 431.

k. Duration of existence of malice.

The court instructs the jury that there is no particular

period during which it is necessary that the malice should have existed or the prisoner should have contemplated the homicide. If the intent to kill is executed the instant it springs into the mind, the offense is as truly murder as if it had dwelt there for a longer period. *State v. Welch*, 36 W. Va. 701.

1. Provoking the affray—Seeking deadly combat.

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the prisoner, armed with a ———, (deadly weapon), sought the deceased with the view of provoking a difficulty with him, or with the intent of having a fray with him, for the purpose of killing him, and a difficulty did ensue, he cannot, without some proof of a voluntary change of conduct or action on his part, excuse the killing of the deceased upon the ground that the deceased fired the first shot, for the law will not hold him guiltless, who by seeking a combat and continuing therein, brings upon himself the necessity of killing his fellow-man, upon the principle that one cannot knowingly and wrongfully bring upon himself the very necessity which he sets up for his defense. *State v. Hatfield*, 48 W. Va. 572.

m. Assault brought on by third party—Intoxication of accused.

The court instructs the jury that if they believe from the evidence that ———, the brother of the prisoner, was in fault and by his fault brought about the assault by the deceased upon him, then said ———, (brother of the prisoner), was bound to retreat as far as he could, unless prevented by the fierceness of the attack threatened by the deceased, before the prisoner was justifiable in taking the life of deceased in order to save the life of ———, (his brother), or to protect him from great bodily harm; unless the jury believe from the evidence that the said

——, (brother of the prisoner), was so drunk as to be mentally incapable of knowing it was his duty to retreat, or physically unable to retreat. *State v. Greer*, 22 W. Va. 818.

n. Same—Character of assault made by deceased.

The court instructs the jury that if they believe from the evidence that the said ——, (brother of the prisoner), provoked the deceased to make an assault upon him and such assault was intended by the deceased to be a mere common trespass upon the person of said ——, (brother of the prisoner), and it so appeared to the prisoner, then the prisoner was not justified in taking the life of the deceased to protect the said —— from such assault or trespass. *State v. Greer*, 22 W. Va. 818.

o. Assault on another in addition to that made upon deceased.

The court instructs the jury that in determining the guilt or innocence of the prisoner for the shooting of —— on the —— day of ——, 18——, they cannot consider the shooting of —— (another), upon his wagon, except in so far as may tend to explain the prisoner's act in shooting or shooting at the deceased, as aforesaid. *State v. Evans*, 33 W. Va. 423.

p. Conspiracy—Murder resulting from.

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that a conspiracy was formed between the prisoner and other persons, whose names are unknown, that the purpose of that conspiracy was to murder ——, and that pursuant to that conspiracy, the unknown members of the conspiracy, or some of them, killed said ——, and that the killing was done with malice aforethought, either expressed or implied, and that the prisoner was present at the time

——— was killed, and aided by acts, or encouraged by words or gestures, those actually engaged in said killing, then said prisoner was a principal in the killing and murder. *State v. Morgan*, 35 W. Va. 274.

q. Same—Intent of and acts done by conspirators.

The court instructs the jury that even if you believe that before ———, ———, 18—, the deceased, the witness, ———, the witness ——— and the witness ———, had threatened, kicked, beat, bruised and assaulted the defendants; yet if you further believe from all the evidence that the defendants followed the deceased and those who were with him on said ——— afternoon, down ——— street, from a point above ——— street to a point near the ——— mentioned in evidence, with the felonious intent to take the life of deceased and there, without further provocation, justification or legal excuse shot and killed the deceased as charged in the indictment, then it is your duty to find them guilty of murder in the first degree. *State v. Johnson & Devinney*, 49 W. Va. 692.

II. MANSLAUGHTER — VOLUNTARY AND INVOLUNTARY.

- a. Voluntary manslaughter—Definition of.
- b. Passion sufficient to reduce homicide to manslaughter.
- c. What necessary to reduce homicide to manslaughter.
- d. Involuntary manslaughter—Accidental killing.

a. Voluntary manslaughter—Definition of.

The court instructs the jury that voluntary manslaughter is where the act causing death is committed in the heat of a sudden passion caused by provocation. And they are further instructed that if they believe from the evidence

that the defendant, in the heat of sudden passion, caused by provocation, killed ———, at the time and place alleged in the indictment, they should find the defendant guilty of voluntary manslaughter, unless they further believe from the evidence that the defendant believed, and had reason to believe that the blow which resulted in ———'s death was necessary to protect his own life or to protect himself from great bodily harm, and that the necessity of inflicting said blow was not brought about by defendant's own conduct. *State v. Diekey*, 48 W. Va. 326.

b. Passion sufficient to reduce homicide to manslaughter.

The court instructs the jury that if they believe from the evidence that on the day that ——— was killed and before he was killed, the prisoner and one ——— went to the machine shops referred to in the evidence and that the prisoner went there at the request of said ——— as detailed in his evidence, and that after the prisoner got to the said machine shops, he became engaged in a quarrel with the deceased which resulted in a fight between them, and that while engaged in said quarrel and fight, the said deceased and the prisoner were excited, angry and that their passions were aroused, and that in said fight, while the prisoner was excited, angry and his passions aroused, he shot and killed the said ———, they cannot find the prisoner guilty of anything higher than voluntary manslaughter. *State v. Dodds*, 54 W. Va. 294.

c. What required to reduce homicide to manslaughter.

The court instructs the jury that if they believe from the evidence that ——— came to his death by a pistol shot wound at the hands of the prisoner, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime; and if the prisoner

would reduce it to manslaughter, the burden of proof rests upon the prisoner. *State v. Hobbs*, 37 W. Va. 819.

d. Involuntary manslaughter—Accidental killing.

The court instructs the jury that accidental killing is not such a matter of defense as throws upon the prisoner the burden of proving it by a preponderance of the evidence; that it is the duty of the state to allege and prove that the prisoner killed ——— intentionally or willfully, and if the evidence in this case taken altogether, raises in the minds of the jury a reasonable doubt as to whether the prisoner killed ——— intentionally or accidentally, they should not find the prisoner guilty of anything higher than involuntary manslaughter or assault and battery. *State v. Dodds*, 54 W. Va. 293.

III. EXCUSE AND JUSTIFICATION.

1. RIGHT TO KILL IN DEFENSE OF PERSON.
2. WHEN PLEA OF SELF DEFENSE NOT AVAILABLE.
3. RIGHT TO KILL IN DEFENSE OF FAMILY OR HABITATION.
4. RIGHT TO KILL IN DEFENSE OF ANOTHER.
5. RIGHT TO KILL TO PREVENT A FELONY.
6. INTOXICATION AND INSANITY.
7. AGE FOR CAPACITY TO COMMIT CRIME.

1. RIGHT TO KILL IN DEFENSE OF PERSON.
 - a. Imminency of danger.
 - b. Danger need not be real but apparent.
 - c. Accused to judge of imminence of danger.
 - d. Apprehension of danger—What must be based on.
 - e. Mutual combat—Death resulting from—What accused must show.
 - f. Fresh provocation—Old grudge between the parties.

- g. Good character of accused.
- h. Burden of proof.
- i. Same—What prosecution required to prove.

a. Imminence of danger.

The court instructs the jury that if they are satisfied from the evidence that the deceased, armed with a ———, attacked the defendant, and that the defendant had reasonable cause to believe and fear, and that he did believe and fear that great bodily harm was about to be inflicted on him, and that under the influence of such belief and fear, he fired the said shot with intent to defend or protect himself, then he is not guilty. *State v. Hobbs*, 37 W. Va. 821.

b. Danger need not be real, but apparent.

The court instructs the jury that if they believe from the evidence that the prisoner, being himself without fault, was attacked by the deceased in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life or to do him great bodily harm, and there was reasonable grounds for believing the danger imminent that such design would be accomplished and the said prisoner had reasonable grounds to believe and did believe such danger imminent, then he had the right to act upon such appearances, and without retreating kill said ———, if he had reasonable grounds to believe and did believe that such killing was necessary in order to avoid the apparent danger, and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him serious injury nor danger that it would be done, but of all this the jury must judge from all the evidence and circumstances in the case. *State v. Clark*, 51 W. Va. 468.

c. Accused to judge of the imminence of danger.

The court instructs the jury that as to the imminency of the danger which confronted the prisoner and the necessity of the killing, in the first instance the prisoner was the judge, but he acted at his peril, as the jury must pass upon his action in the premises, viewing the said actions from the prisoner's standpoint at the time of the killing, and if the jury believe from all the facts and circumstances in the case, that the prisoner had reasonable grounds to believe and did believe the danger imminent, and that the killing was necessary to preserve his own life, or to protect him from great bodily harm, he was excusable for using a deadly weapon in his defense, otherwise he is not. *State v. Clark*, 51 W. Va. 468.

d. Apprehension of danger—What to be based on.

The court instructs the jury that the bare fear that a man intends to commit murder or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time, but the jury will judge whether the conduct and acts of the deceased, ———, at the time of the shooting were of such a character as to create in the mind of the prisoner a reasonable fear that the deceased intended to commit murder or other felony, or to do the prisoner great bodily harm. Apprehension of danger to justify a homicide, ought to be based not alone on surmises; but there ought to be coupled therewith some act on the part of the party from whom danger was apprehended, evidencing an immediate intention to carry into execution his threats or designs; and the jury are to judge of the reasonable grounds for such apprehension on the part of the prisoner from all the facts and circumstances, as they existed at the time of the killing. *State v. Cain*, 20 W. Va. 710.

e. Mutual combat—Death ensuing from—What accused must show.

The court instructs the jury that where there is a quarrel between two persons and both are in fault, and a combat as a result of that quarrel takes place, and death ensues, in order to reduce the offense to killing in self-defense two things must appear from the evidence and circumstances of the case:—First, that before the mortal blow was given, the prisoner declined further combat and retreated as far as he could with safety; and secondly, that he necessarily killed the deceased in order to preserve his own life or to protect himself from great bodily harm. *State v. Kohne*, 48 W. Va. 337.

f. Fresh provocation—Old grudge between the parties.

The court instructs the jury that where a homicide has been committed, and it appears from the evidence that there was an old grudge existing between the parties, but at the time of the homicide there was a fresh and sudden provocation given by the deceased to the defendant, then the law presumes that such killing was caused by such provocation and not due to the old grudge. *State v. Mann*, 48 W. Va. 485.

g. Good character of accused as an element of self-defense.

The court instructs the jury that the law presumes the prisoner innocent, and that in determining the question of the defendant's guilt or innocence in this case it is the duty of the jury to consider and weigh all the evidence that has been introduced including that tending to establish the good character of the defendant. *State v. Morrison*, 49 W. Va. 218.

h. Burden of proof.

The court instructs the jury that where a homicide is

proven by the use of a deadly weapon, and the plea of self-defense is relied upon, the burden of proving such defense rests upon the prisoner, and to avail him, the facts and circumstances showing such defense must be established by a preponderance of the evidence. *State v. Hatfield*, 48 W. Va. 571.

i. Same—What prosecution required to prove.

The court instructs the jury that although upon a trial for murder, where the defendant relies upon self-defense, in justification of the killing, the burden is upon the defendant, yet this in no wise relieves the state from proving all the elements of murder if it seeks a conviction, beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis, and if, in the case on trial, the burden is upon the prisoner to prove that he was acting in self-defense by a preponderance of the evidence, yet this in nowise relieves the state, if it seeks a conviction, from proving the prisoner guilty beyond every reasonable doubt, and to the exclusion of every reasonable hypothesis, and if the state does not so prove the defendant guilty beyond every reasonable doubt and to the exclusion of every other hypothesis, they must find the defendant not guilty. *State v. Manns*, 48 W. Va. 486.

2. WHEN PLEA OF SELF DEFENSE NOT AVAILABLE.

- a. When accused is at fault—Concerning acts of deceased.
 - b. Same.
 - c. Previous threats—When they do not justify homicide.
 - d. Same—Must be accompanied by overt acts.
- a. When accused is at fault—Concerning acts of deceased.

The court instructs the jury that if they believe from

the evidence, beyond a reasonable doubt, that the prisoner, armed with a ———, approached the deceased while he was peaceably standing on ———, in such a manner as to give the deceased reasonable cause and ground to apprehend a design on the part of the prisoner to do him some great bodily injury, or to kill him, and reasonable cause to believe and apprehend that there was imminent danger of such design being accomplished, and if the jury believe that the said ———, (the deceased), did then and there have such apprehension and belief, then the deceased had then and there a right to procure a gun, shoot at, and even to kill the prisoner in order to save his own life, or to protect himself from great bodily harm at the hands of the prisoner, and if the prisoner, under such circumstances killed the deceased he cannot be acquitted upon the plea of self-defense, but of all such facts and circumstances the jury are to judge from all the evidence before them. *State v. Hatfield*, 48 W. Va. 571.

b. Same.

The court instructs the jury that if they believe from the evidence that the prisoner, armed with a ———, a deadly weapon, on the ——— day of ———, at ———, in said county, approached the deceased, without fault on the part of the deceased, and then and there applied to said deceased epithets and insulting language, he, said prisoner, intending then and there, before and at the time of approaching the said deceased and applying to him such epithets and insulting language, and by his manner indicating to the deceased if he, said deceased, resented by any overt act such epithets and insulting language, to instantly kill deceased, or to inflict upon him great bodily harm, and that while using such epithets and insulting language a bystander pushed or led away said prisoner, involuntarily on the part of the prisoner, and against his will, to a distance of ——— feet from the place where the

prisoner had commenced the use of such epithets and insulting language, and that the prisoner while so being led away still continued to have such intention and killed the deceased while making an overt act toward the prisoner, indicating to said prisoner an intention to shoot the prisoner or to inflict upon him great bodily harm, then the prisoner cannot rely upon self-defense as a justification for the killing of said ———. *State v. Hatfield*, 48 W. Va. 572.

c. Previous threats—When they do not justify homicide.

The court instructs the jury that previous threats or acts of hostility, however violent they may be, will not justify a person in seeking and slaying his adversary. *State v. Allen*, 45 W. Va. 75.

d. Same—Must be accompanied by overt acts.

The court instructs the jury that the fact of one person having threatened to take the life of another, or to inflict upon him a great bodily injury, will not excuse the person so threatened in becoming the aggressor, and with deadly weapon assault the person making such threats, and that although the jury may believe from the evidence that deceased, in his lifetime, had made threats to take the life of the prisoner or to inflict upon him great bodily harm, the fact of making such threats towards the prisoner will not justify a verdict of acquittal, unless the jury further find that at the time the deceased was shot, he was making overt acts towards the prisoner, indicative of an intention to carry such threats into immediate execution, and that, by reason of such threats and overt acts, the prisoner believed that it was necessary then and there to shoot with a deadly weapon the said ———, the deceased, in order to save his (the prisoner's) life, or to protect him from great bodily harm. *State v. Staley*, 45 W. Va. 796.

3. RIGHT TO KILL IN DEFENSE OF FAMILY OR HABITATION.

- a. Sacredness of one's home—Right to defend.
- b. Same—Right to repel force by force in defense of.
- c. Same—Apparent or necessary force required.
- d. Same—Fierceness of assault—Fear of great bodily harm.

a. Sacredness of one's home—Right to defend.

The court instructs the jury that a man's house is sacred, and his own castle, to himself and family, and that if attacked in his own house by a person armed with a dangerous weapon, and he has reason to believe, and does believe, he is in danger of losing his life, or in danger of suffering great bodily harm, at the hands of his assailant, he is not required to retreat, but may defend his life or person by taking the life of his assailant without retreating. *State v. Hobbs*, 37 W. Va. 820.

b. Same—Right to repel force by force in defense of.

The court instructs the jury that the dwelling house where a man lives is his home or castle, and that he may repel force by force in the defense of his person, habitation or property against one who manifestly intends and endeavors by violence to commit a known felony on either, and in such case he is not bound to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill his adversary in so doing it is justifiable self-defense. *State v. Manns*, 48 W. Va. 486.

c. Same—Apparent or necessary force required.

The court instructs the jury that a person has a right to repel force by force in the defense of his person, his family or his habitation, and if in so doing he use only so much force as the necessity or apparent necessity of the

case requires, he is not guilty of any offense, although he kill his assailant in so doing. *State v. Manns*, 48 W. Va. 486.

d. Same—Fierceness of the assault—Fear of great bodily harm.

The court instructs the jury that if they believe from the evidence that the house in which defendant lived was assaulted by the deceased, and that the deceased shot at and into the said house where the defendant and his family were at supper, and if they further believe from the evidence that the prisoner at the time had reasonable cause to believe that he, or any member of his family were in danger of losing their lives or suffering great bodily harm at the hands of the deceased, then the defendant had a right to defend his house, even to the extent of taking the life of the deceased, and if you further believe from the evidence that the defendant killed the deceased, believing from the surrounding circumstances and the conduct of the deceased and the fierceness of the assault of the deceased, that it was necessary so to do to protect his house and his family, then they should find the defendant not guilty. *State v. Manns*, 48 W. Va. 486.

4. RIGHT TO KILL IN DEFENSE OF ANOTHER.

a. Concerning character of assault made by deceased.

The court instructs the jury that if they believe from the evidence that the said ———, (brother of the prisoner), provoked the deceased to make an assault upon him and such assault was intended by the deceased to be a mere common trespass upon the person of said ———, (brother of the prisoner), and it so appeared to the prisoner, then the prisoner was not justified in taking the life of the deceased to protect said ——— from such assault or trespass. *State v. Greer*, 22 W. Va. 818.

5. RIGHT TO KILL TO PREVENT A FELONY.

a. **Unlawful trespass upon the property of another.**

The court instructs the jury that the owner or occupant of property in the lawful possession of the same has a right to use as much force as is necessary to prevent an unlawful or forcible trespass upon the same, and if they find that the defendant was standing upon his own ground, or upon ground of which he was in lawful possession, and that in attempting to force a passage over the same, if they so find, the deceased was violating the law and was a trespasser with the intent and with the means of committing a felony, and was attempting to commit a felony against the person or property of the prisoner, then the defendant, as owner or occupier of the land, if they so find, might repel force by force to the extent of killing the said ———, if necessary so to do to prevent the commission of said felony, and such killing would be excusable. *State v. Clark*, 51 W. Va. 468.

6. INTOXICATION AND INSANITY.

- a. Intoxication—Capacity for knowing consequences of act.
 - b. Same—Capacity for premeditation.
 - c. Same—When the evidence tends to prove mental incapacity.
 - d. Same—Of person in whose defense homicide committed.
 - e. Insanity—Sufficient power of mind to distinguish right from wrong.
-
- a. **Intoxication—Capacity for knowing consequences of act.**

The court instructs the jury that if they believe from the evidence beyond a reasonable doubt, that the prisoner,

though intoxicated at the time of the firing of the shot, which caused the death of the deceased, was capable of knowing the nature and consequences of his act, and if he did know, then that he knew he was doing wrong, and that so knowing he fired the shot at the deceased with the willful, deliberate and premeditated purpose of killing him, they will find the prisoner guilty of murder in the first degree. *State v. Robinson*, 20 W. Va. 743.

b. Same—Capacity for premeditation.

The court instructs the jury that if they believe from all the circumstances in the case that the prisoner willfully, maliciously, deliberately and premeditatedly killed the deceased, they should find him guilty of murder in the first degree, although he was intoxicated at the time of the killing. *State v. Douglass*, 28 W. Va. 301.

c. Same—When the evidence tends to prove the mental incapacity.

The court instructs the jury that where a statute establishes degrees of the crime of murder, and provides that all willful, deliberate and premeditated killing shall be murder in the first degree, the evidence given on the trial tending to prove that the accused was intoxicated at the time of the killing, is competent for the consideration of the jury upon the question whether the accused was in such a condition of mind as to be capable of deliberation and premeditation. *State v. Hertzog*, 55 W. Va. 83.

d. Same—Of person in whose defense homicide committed.

The court instructs the jury that if they believe from the evidence that ———, the brother of the prisoner, was in fault, and by his fault brought about the assault by the deceased upon him, then said ———, brother of the prisoner, was bound to retreat as far as he could, unless pre-

vented by the fierceness of the attack upon him threatened by the deceased, before the prisoner was justifiable in taking the life of the deceased in order to save the life of his brother or to protect him from great bodily harm, unless the jury believe from the evidence that said ———, brother of the prisoner, was so drunk as to be mentally incapable of knowing that it was his duty to retreat, or was physically unable to do so. *State v. Greer*, 22 W. Va. 818.

e. Insanity—Sufficient power of mind to distinguish between right and wrong.

The court instructs the jury that if they believe from the evidence that ——— murdered ———, as charged in the indictment, and had at the time sufficient power of mind to distinguish between the right and the wrong of such an act, although they believe he suffered from mental aberration as to other matters, the verdict ought to be guilty. *State v. Maier*, 36 W. Va. 770.

7. AGE FOR CAPACITY TO COMMIT CRIME.

a. How question determined.

The court instructs the jury that to establish capacity to commit crime in a person over seven and under fourteen years, it is not necessary that any witness shall state that he has such capacity, but the same may be shown to exist by the appearance and general conduct of the accused, and by his testimony as a witness before the jury. *State v. Williams*, 40 W. Va. 269.

IV. DEGREES OF OFFENSE—PUNISHMENTS IMPOSED.

a. Whether murder in first or second degree—Additional findings.

The court instructs the jury that if they find the pris-

oner guilty as charged in the indictment, they shall further find whether he is guilty of murder in the first or in the second degree. If they find him guilty of murder in the first degree, they may, in their discretion, further find that the prisoner be punished by confinement in the penitentiary, and if such further finding be not added to such verdict, the judgment thereupon rendered by the court will be that the prisoner be punished with death, and if such further finding is added, the judgment thereupon rendered by the court will be that the prisoner be confined in the penitentiary during his life. If the jury find the prisoner guilty of murder in the second degree, as charged in the indictment, the punishment imposed upon the prisoner will be confinement in the penitentiary not less than five nor more than eighteen years. *State v. Hatfield*, 48 W. Va. 573.

CHAPTER 39.

HOUSE OF ILL FAME.

- a. Contract of sale—Occupancy of property under.
 - b. Same—Parting with ownership by former owner.
 - c. Same—Knowledge of former owner of purpose for which house was to be used.
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- a. Contract of sale—Occupancy of property under.

The court instructs the jury that if they believe from the evidence that the defendant and —— made and entered into the contract of sale introduced in evidence, of the property named in the indictment, and further believe that for one year next preceding the finding of the indictment in this case the said —— occupied said

property under said contract of sale, then the jury must find the defendant not guilty. *State v. Emblem*, 44 W. Va. 523.

b. Same—Parting with ownership by former owner.

The court instructs the jury that if they believe from the evidence that the contract introduced in evidence between the defendant and ———, for the property mentioned in the indictment, was a *bona fide* contract of sale, and that under said contract the said defendant parted with the ownership and control of said property, then the jury must find the defendant not guilty. *State v. Emblem*, 56 W. Va. 681.

c. Same—Knowledge of former owner of purpose for which house was to be used.

The court instructs the jury that if they believe from the evidence that the contract of sale introduced in this case operated between the parties thereto as a *bona fide* sale of the property mentioned in the indictment, then even if they believe that the defendant knew that the property was to be used as a house of ill-fame, the jury must find the defendant not guilty. *State v. Emblem*, 58 W. Va. 681.

CHAPTER 40.

INSURANCE.

- I. FIRE INSURANCE.
- II. LIFE INSURANCE.
- III. ACCIDENT INSURANCE.

I. FIRE INSURANCE.

- 1. THE POLICY OR CONTRACT.
 - 2. PROOF OF LOSS.
 - 3. WAIVER OF RIGHT TO AVOID PAYMENT OF LOSS.
-
- 1. THE POLICY OR CONTRACT.
 - a. Written agreement exclusive evidence of contract.
 - b. Mistake as to party insured—Knowledge of insurer as to.
 - c. Same.
 - d. Condition of property insured—Knowledge of insurer as to.
 - e. Change in date covering policy after loss occurs.
 - f. Title or ownership of property—Knowledge of insurer as to.
 - g. Same—Partnership in profits and losses.
 - h. Incumbrances upon property — Knowledge of insurer as to.
 - i. Same—Absence of fraud upon part of insured.
 - j. Same—Rebuilding property destroyed.
 - k. Same—Assignment of policy to secure mortgage.
 - 1. Fraud or misrepresentation as to name of insured.
 - m. Fraud or misrepresentations by insured as to value of property.

- n. Same—As to incumbrances.
- o. Fraudulently altering receipt for premiums.
- p. Increase of risks—Avoidance of policy because of.
- q. Additional insurance—Condition of policy against.
- r. Same—Knowledge or consent of insurer as to.
- s. Same—Illiteracy of insured.
- t. Prior insurance—Knowledge of insurer as to.
- u. Same—Effect of prior policy being void.
- v. Renewal of policy—Authority of agents—Receipt for renewal.
- w. Same.
- x. Books and papers—Parol waiver of requirement as to where to be kept.
- y. Intentional burning property insured.
- z. Awards—Repudiation by insured of award—Demand of insured for second appraisalment.

a. Written agreement exclusive evidence of contract.

The court instructs the jury that when parties have made a written agreement, the writing is regarded as the exclusive evidence of the contract, and all oral negotiations and stipulations preceding or accompanying the execution of the written agreement are merged in it, and are not admissible in evidence, and all such oral negotiations and stipulations should not be considered by you to contradict or vary the written policy in this case. *Maupin v. Insurance Co.*, 53 W. Va. 566.

b. Mistake as to party insured—Knowledge and acts of agent of insurer.

The court instructs the jury that if they believe from the evidence that the defendant, at the time it issued the policy in this suit, was fully and honestly advised of all the facts attending the ownership of the property insured, and that it was left with the defendant, through its

agents, with such knowledge of all the facts, to issue a valid and legal policy upon said property, and the said policy, by mistake and error of said agent, or his clerk or employe, was issued in the name of plaintiff when it should have been issued in the name of his wife, then such mistake does not vitiate said policy nor affect the right of the plaintiff to recover in this suit. *Deitz v. Insurance Co.*, 33 W. Va. 533.

c. **Same.**

The court instructs the jury that if they find from the evidence that at the time the policy in suit was executed — was the agent of the defendant company and employed — in his office to aid him in the discharge of his duties as such agent, and that the said — at the instance of the said agent examined the property insured before said insurance was taken, wrote out the policy in suit and signed and countersigned the same for the said agent by his business name of — & Co.; received the cash premium that was paid and transacted the whole business, so far as the defendant is concerned, in taking and completing said insurance, and if the jury further find from the evidence that said — knew when transacting said business that the property insured belonged to the wife of the plaintiff; that he had been so told before writing up said policy by both plaintiff and his wife, and that both plaintiff and his wife relied upon him as acting for the defendant to issue a good and valid policy of insurance upon said property; that he knew at the time they so relied upon him, and he intended to issue the same in the name of the wife, but by mistake on his part issued the same in the name of plaintiff, then the mistake of said — does not vitiate said policy nor affect the plaintiff's right to recover in this action. *Deitz v. Insurance Co.*, 33 W. Va. 531.

d. Condition of property insured—Knowledge of insurer as to.

The court instructs the jury that if they believe from the evidence that the agent of the defendant, who took the application, had at the time a knowledge of the buildings, and the manner in which the stove pipe and chimney were secured at the time the insurance was effected, and took upon himself to fill up the blank application, and did so upon his own information, then it was not required of the plaintiff, under the policy, to change the condition of the pipe and chimney, but he was required to keep them in good order and condition, but was not required to put them in better order and condition than they were in at the time the insurance was made. *Simmons v. Insurance Co.*, 8 W. Va. 491.

e. Change in date covered by policy after loss occurred.

The court instructs the jury that if they believe from the evidence that the policy which has been introduced in evidence was issued by the defendant on the — day of —, 18—, and was then written so as to cover the period from the — day of —, 18—, to the — day of —, 18—; and if they further believe that on the — day of —, 18—, the agent of the company, at the request of the agent of the assured, notified the defendant company that it was desired to have the dates in the policy changed so as to cover a period of —, beginning on the — day of —, 18—, and that upon receiving such notice, the defendant company made no objection to the proposed change; and if they further believe that on the — day of —, 18—, the change was made as proposed, all parties being in ignorance that the fire had occurred; and if they further believe that the said policy was delivered to the agent of the assured, and that the defendant company received and retained the premium therefor—then the fact that the property had burned at

the time when such change was made will not prevent a recovery in this action by the plaintiff. *Land Co. v. Insurance Co.*, 35 W. Va. 677.

f. Title or ownership of property—Knowledge of insurer as to.

The court instructs the jury that if they believe from the evidence that before the issuance of the policy read in evidence, the duly authorized agent of the defendant who took the said policy and represented the defendant in procuring the same was fully informed of the facts of and concerning the plaintiff's title and ownership of the real estate referred to in said policy, and was informed of the provisions of the deed conveying said property to the plaintiff, and that he, the said agent, then and there informed the representative of the plaintiff that the policy should be taken in the name of the plaintiff as the owner of said property, and that the representative of the plaintiff relying upon said representative and agent of the defendant, assented to such suggestion, and that the policy was accordingly so written by the representative of the defendant and delivered to the plaintiff and the representative of the defendant then and there accepted and received the premium for the said policy, then the defendant would not be relieved from liability under said policy, even if the deed referred to only vested a life estate in the plaintiff. *Medley v. Insurance Co.*, 55 W. Va. 364.

g. Same—Partnership in profits and losses.

The court instructs the jury that if they believe from the evidence that the arrangement between the assured and this third person, under which the wool in controversy was bought and held, was that expressed in the letter, then there was a partnership between the assured and this third person in the profits or losses of the trans-

action, still the interest of the assured in the wool itself was the entire sole and unconditional ownership within the meaning of this policy. *Welch v. Insurance Co.*, 23 W. Va. 310.

h. Incumbrances upon property—Knowledge of insurer as to.

The court instructs the jury that if they believe from the evidence that before the issuance of the policy of insurance read in evidence a trust lien on the real estate mentioned existed in favor of ———, and that the agent of the defendant who acted in the issuance and delivery of said policy was informed and notified of the existence of said lien and of the fact that it remained unpaid and that the said agent then and there stated that the fact of the existence of said lien made no difference, and that he issued said policy and received the premium therefor with full notice thereof, then the defendant would not be relieved from liability on said policy on account of its existence at its date and delivery of the said deed of trust. *Medley v. Insurance Co.*, 55 W. Va. 365.

i. Same—Absence of fraud on part of insured.

The court instructs the jury that if they believe from the evidence that at the time the application was made for the policy in controversy the agent who took said application wholly prepared and wrote the same, and that at the time the plaintiff informed him of the incumbrance upon said property, or that, prior to said time, said agent had full knowledge of said incumbrance, then and in that event the answer incorporated into said application, though incorrect in regard to said incumbrance, will afford no defense to said company to this action, in the absence of fraud on the part of plaintiff. *Coles v. Insurance Co.*, 41 W. Va. 264.

j. Same—Rebuilding property destroyed.

The court instructs the jury that whether the policies were delivered by ——— to ——— after the fire, the said ——— saying to ——— at the time of such delivery to collect the insurance money and apply the same to rebuilding on the mortgaged property, is a question for the jury, and if they believe such was the fact such transfer of the policies by ——— to ——— is not a bar and has no tendency to prevent the plaintiff recovering in this action. *Bentley v. Insurance Co.*, 40 W. Va. 752.

k. Same—Assignment of policy by insured to secure mortgage debt.

The court instructs the jury that if they believe from the evidence that the assignment attached to the face of the policy was made by ——— as collateral security to the plaintiff for a mortgage debt on a part of the property insured and the assignment as written was approved by the defendant company, then the effect of such assignment was to give the plaintiff a right to recover in this action whatever sum, after a fire should occur, ——— would have been entitled to recover had no such assignment and approval been made, with interest on said sum to the date of the verdict from the time it became payable according to the terms of the policy when complied with by said ———. *Bentley v. Insurance Co.*, 40 W. Va. 752.

l. Fraud or misrepresentations as to name of insured.

The court instructs the jury that if they believe from the evidence that the insured or his agent at the time of the making of said policy knew or believed that the agent of the defendant supposed that J. T. was, in fact, the person whose goods were being insured, and neglected and failed to correct his mistake, and thus misled him as to

the person whose goods were actually insured, then such policy would not be a contract between the plaintiff and the defendant company. *Travis v. Insurance Co.*, 28 W. Va. 598.

m. Fraud or misrepresentations by insured as to value of property.

The court instructs the jury that if they believe from the evidence that before and at the time of the making and issuing of the policy of insurance sued on, the plaintiff, or his agent acting for him in that behalf, represented and stated to defendant's agent who issued said policy and with whom said contract of insurance was wholly made, that the — about to be insured was worth \$—, and if the jury further believe from the evidence that the said agent of the said defendant relied upon said statements and representations as to the value of said insured property and issued said policy of insurance relying upon and confiding in said representations and statements, and if the jury should further find from the evidence that said representations and statements were false and were known to said — to be false, and that said insured property was worth materially less than said —, and that this fact was known to the said —, (the insured), to be false, then the court instructs the jury that such false representations and statements avoid the policy, and the jury should find for the defendant. *Travis v. Insurance Co.*, 28 W. Va. 589.

n. Same—As to incumbrances.

The court instructs the jury that if they believe from the evidence that the property insured, or a material portion thereof, was encumbered at the time the application in writing was made by the plaintiff to the defendant for the policy sued on, and that he denied in said application the fact of said encumbrance, and they further believe

that in said application and policy the plaintiff warranted the truth of the statements and answers made in said application, that then they shall find for the defendant. *Coles v. Insurance Co.*, 41 W. Va. 264.

o. Fraudulently altering receipt for premiums.

The court instructs the jury that if they believe from the evidence that the plaintiff, ———, with fraudulent intent, altered the receipt for \$——, produced in evidence, then they are to deny him all benefit from the said receipt as evidence of a contract or for any purpose whatever. *Sheppard v. Insurance Co.*, 21 W. Va. 373.

p. Increased risks—Avoidance of policy because of.

The court instructs the jury that if they believe from the evidence that the additional use of the store building for storing and vending farm implements and hardware, sash, doors, etc., without the permission of the defendant company, increased the risk to it, then they shall find for the defendant. *Coles v. Insurance Co.*, 41 W. Va. 264.

q. Additional insurance—Condition of policy against.

The court instructs the jury that although they believe from the evidence that, according to the contract contained in the policy sued on, the plaintiff was inhibited from taking out the policies in the ——— company and the ——— company (other companies) without the consent of the defendant indorsed on the policy sued on, yet if they further find that said policies in the said ——— and ——— companies (other companies) contain a clause in the contract in said policies forfeiting or avoiding said policies if plaintiff failed to give notice to said companies, or of either prior or subsequent policies of insurance on said property described in the policy sued on, and said plaintiff did effect either prior or subsequent insurance on the property set out in the policy sued on, and failed to

give notice thereof to said companies, and have their assent indorsed on said policies of the —— company and the —— company, then the said subsequent insurance policies will not avoid the policy sued on. *Woolpert v. Insurance Co.*, 42 W. Va. 659.

r. Same—Knowledge or consent of insurer as to.

The court instructs the jury that if they believe from the evidence that when the plaintiff applied to the agent of the defendant for the policy of insurance sued on, the agent of the defendant told him he could take out additional insurance in other companies, and plaintiff, in pursuance of such permission, did afterwards take out the policies in the —— company and the —— company (other companies) then the omission or failure of said agent or defendant to indorse the said permission or the assent of the defendant company on the policy sued on will not avoid said policy. *Woolpert v. Insurance Co.*, 42 W. Va. 659.

s. Same—Illiteracy of insured.

The court instructs the jury that if they believe from the evidence that plaintiff could not read or write the English language, and he so informed the agent of the defendant when he made application for the policy sued on, and that the defendant's agent then informed plaintiff that he could take out additional insurance in other companies, and did not inform him that the assent of the company to such additional insurance must be indorsed on the policy sued on, and did not read said policy to him, and said agent failed to indorse such assent on the policy, then the failure of plaintiff to give notice to the defendant of subsequent insurance, and have the assent of the defendant indorsed on the policy sued on, will not forfeit or avoid said policy. *Woolpert v. Insurance Co.*, 42 W. Va. 660.

t. Prior insurance—Knowledge of agent as to.

The court instructs the jury that if they believe from the evidence that at the time the plaintiff applied for insurance upon the stock of goods, he informed the agent of the defendant company that he had taken out previous insurance in the ——— company, then the failure of the agent of the defendant to endorse this fact upon the policy cannot avoid the policy sued on. *Woolpert v. Insurance Co.*, 44 W. Va. 736.

u. Same—Effect of prior policy being void.

The court instructs the jury that if they believe from the evidence that the policy issued to the plaintiff by the ——— company was a void policy, or one upon which there could be no recovery, then the failure of the plaintiff to inform the defendant of the issuing of the policy sued upon or the taking out of said policy in the ——— company, cannot affect the plaintiff's right to recover in this cause. *Woolpert v. Insurance Co.*, 44 W. Va. 736.

v. Renewal of policy—Authority of agent—Receipt for renewal.

The court instructs the jury that if they believe from the evidence that the receipt for \$——, submitted to them in evidence was executed by —— and delivered to the plaintiff, that the said —— was, at the time the receipt was so given, the agent of the defendant to transact the business of insurance for it, and as such receipted for premiums known as renewal premiums, and shall further believe from the evidence that the said receipt was given to renew the policy in the declaration mentioned, they will find for plaintiff whatever amount of loss within the limits of the amount named in the policy they shall find from the evidence was sustained by him by fire between the date of the said receipt and the —— day of ——, 18—. *Sheppard v. Insurance Co.*, 21 W. Va. 375.

w. Same—As to limited power of agents.

The court instructs the jury that if they believe from the evidence that a contract of the insurance of the plaintiff's barn, insured by him as administrator, was made by him with ———, with reference to and for the purpose of reinstating or renewing the policy with the declaration filed, so that said policy was continued until after the loss complained of occurred, and shall further believe from the evidence that the said ——— was the general agent of the ——— Insurance Company (the defendant) to transact the general business for it, then the plaintiff is entitled to recover whatever loss, within the sum covered by the policy, the jury shall believe from the evidence has accrued to the plaintiff, unless they further believe from the evidence that the general powers of the said agent were so restrained by the company as to prohibit the said agent from making the contract herein first mentioned, and that the plaintiff had notice of said prohibition. *Sheppard v. Insurance Co.*, 21 W. Va. 376.

x. Books and papers—Parol waiver of requirements as to where to be kept.

The court instructs the jury that if they believe from the evidence in this case, that the policy sued on herein contains a stipulation that "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or condi-

tions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached" then the insurance company can not be deemed to have waived such Iron-safe clause, unless such waiver was so indorsed on or attached to said policy, and any alleged parol waiver is incompetent and should not be considered by you. *Maupin v. Insurance Co.*, 53 W. Va. 566.

y. Intentional burning the property insured.

The court instructs the jury that it is not necessary in order to prevent the plaintiff's recovery that the plaintiff should be proved, beyond a reasonable doubt, to have intentionally and fraudulently caused or permitted the said insured property to be set on fire, but if the weight or preponderance of evidence be to that effect the jury should find for the defendant. *Simmons v. Insurance Co.*, 8 W. Va. 496.

z. Awards—Repudiation by insured of award—Demand of insurer for second appraisement.

The court instructs the jury that if after the appraisement made by —, — and —, the plaintiff repudiated said appraisement and refused to accept the amount thereof claimed to be chargeable to the defendant, then the defendant had the right, afterwards to insist upon an appraisement to be made by two competent and disinterested appraisers, the plaintiff to select one and the defendant one, and the two so selected to name an umpire, as provided in lines — to —, both inclusive of the policy, and if the jury find that the plaintiff, for any cause, refused to accept the result of said appraisal, and that after the knowledge of such refusal the defendant called upon the plaintiff by letter dated —, —, to submit to such appraisal as is provided to be made by

said lines —— to ——, both inclusive, of the policy, and if the jury further believe from the evidence that the plaintiff has failed or refused to enter into such an appraisal as demanded by said letter, then the plaintiff cannot recover. *Levy v. Insurance Co.*, 58 W. Va. —.

2. PROOF OF LOSS.

- a. Notice required by the policy—How may be given.
- b. Time for making proof of loss—Waiver of notice.
- c. Same.
- d. Forthwith notice of loss—How construed.
- e. Awards by arbitrators—When evidence of not required.
- f. Loss covered by insurance—How estimated.
- g. Same.
- h. Same—Burden of proof — Preponderance of evidence.

a. Notice of loss required by policy—How may be given.

The court instructs the jury that the forthwith notice required by the policy to be given by persons sustaining loss may be given by the assured through an agent, and need not be given by him in person. *Land Co. v. Insurance Co.*, 35 W. Va. 677.

b. Time for making proof of loss—Waiver of proof.

The court instructs the jury that the failure to furnish proofs of loss under the policy within thirty days after the fire does not, under all circumstances, and at all events, constitute a bar to the plaintiff's recovery. The defendant, for whose benefit the provision is made, may waive a compliance with it; and, even in the absence of a waiver, a delay for more than thirty days in furnishing the proofs will not be conclusive against the plaintiff's case unless it appears that the plaintiff has unreasonably

delayed furnishing such proof of loss, or that the defendant has in some way been prejudiced by the delay. *Land Co. v. Insurance Co.*, 35 W. Va. 677.

c. Same.

The court instructs the jury that if they believe from the evidence that the plaintiff did not render to the secretary of the defendant company a particular statement of the loss within thirty days thereafter, that then the plaintiff is not entitled to recover in this action, unless they further find that the defendant waived this requirement of the policy. *Land Co. v. Insurance Co.*, 35 W. Va. 679.

d. Forthwith notice of loss—How construed.

The court instructs the jury that the provision in the policy which has been introduced in evidence, requiring persons who have sustained loss by fire to give notice forthwith to the secretary of the defendant, is not to be construed as requiring that such notice should be absolutely immediate, but only as requiring that it should be given within a reasonable time, under the circumstances of the case. *Land Co. v. Insurance Co.*, 35 W. Va. 677.

e. Award by arbitrators—When evidence of not required.

The court instructs the jury that under the provisions of the policy which has been introduced in evidence it is not necessary that the plaintiff, in making out his case, should furnish evidence of an award of arbitrators, in the absence of any showing that a submission to arbitrators was requested by either party, and in the absence of any showing that an award was in fact made. *Land Co. v. Insurance Co.*, 35 W. Va. 677.

f. Loss covered by insurance—How estimated.

The court instructs the jury that if they believe from

the evidence that the plaintiff is entitled to recover in this action, they may find a verdict for whatever amount of loss the jury believe from the evidence ——— has suffered by the fire of ——— 18—, with interest on such amount from sixty days after the proofs of loss were received by defendant company to the date of the verdict. *Bentley v. Insurance Co.*, 40 W. Va. 752.

g. Same.

The court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover, their verdict should be for the whole amount of the loss of ——— by the fire of ——— 18—, on all of the insured property estimated according to the actual cash value of such loss at the time of the fire, with interest on such amount from sixty days after the proofs of loss were received by the defendant company to the date of the verdict. *Bentley v. Insurance Co.*, 40 W. Va. 752.

h. Burden of proof—Preponderance of evidence.

The court instructs the jury that the burden of proof is on the plaintiff to make out his case by a preponderance of testimony, and that if they find the evidence evenly balanced, their verdict must be for the defendant. In other words, the plaintiff's claim to recover in this action must be established by evidence which, in the opinion of the jury, outweighs the evidence produced by the defendant to resist the plaintiff's claim. If therefore, in the opinion of the jury, the weight of evidence on each side is exactly equal, the plaintiff must fail in his recovery. *Sheppard v. Insurance Co.*, 21 W. Va. 374.

3. WAIVER OF RIGHT TO AVOID PAYMENT OF LOSS.

- a. Waiver of insurer of requirement to furnish statement as to other insurance.

- b. Knowledge of insurer as to destruction of property by fire.
 - c. Same—Refusal of insurer to pay loss.
 - d. Defective proof of loss—Failure to return.
 - e. Refusal of payment on other grounds than failure to furnish proof.
- a. **Waiver by insurer of requirement to furnish statement as to other insurance held by insured and of requirement to furnish list of property destroyed.**

The court instructs the jury that if they believe from the evidence that the plaintiff has not made and rendered to the defendant a statement in writing, signed and sworn to by her, stating all other insurance, whether valid or not, covering any of the property insured by the defendant, the cash value of each item of property insured and the amount of loss thereon, then the plaintiff cannot recover, unless the jury should further believe from the evidence that the defendant waived the furnishing of such statement by such conduct of the defendant as would reasonably cause the plaintiff to fairly conclude that such requirements or statements had been dispensed with and excused. *Levy v. Insurance Co.*, 58 W. Va. —.

- b. **Knowledge of insurer as to destruction of property by fire—Declarations of insurer as to refusal to pay loss.**

The court instructs the jury that if they believe from the evidence that the defendant upon being notified of the destruction of the property insured, sent its adjuster to settle the loss some ——— weeks after the fire, and the said adjuster after the examination of the facts and circumstances attending the burning, by his acts and declarations gave the plaintiff to understand, and they were such as would give any reasonable and sensible person to understand, that the loss would not be settled with-

out a suit, and that it would not avail him to furnish such proof of loss as is required by the policy, then such proof of loss was waived by the defendant and the failure to furnish it is no defence to this action. *Deitz v. Insurance Co.*, 33 W. Va. 532.

c. Same—Refusal of insurer to pay loss.

The court instructs the jury that if they believe from the evidence that the defendant after being notified of the burning of the premises insured, sent its adjuster to settle the loss, and said adjuster after an examination of the facts and circumstances attending the burning, notified the plaintiff that the defendant was not liable and would not settle the loss, such notification was a waiver of the proof of loss mentioned by the policy on the part of the defendant, and the failure of the plaintiff to provide such proof is no defence to this action. *Deitz v. Insurance Co.*, 33 W. Va. 532.

d. Defective proof of loss—Failure to return.

The court instructs the jury that if they believe from the evidence that the plaintiff furnished the defendant with a proof of loss, although defective, and not such as is required by the policy sued on, and if they further find that the defendant never returned such proof to plaintiff nor complained of it as being defective, then the defendant waived all defects in said proof and cannot set up the same in defence to this action. *Deitz v. Insurance Co.*, 33 W. Va. 532.

e. Refusal of insurer to pay policy on other grounds than failure to furnish proof of loss.

The court instructs the jury that if they believe from the evidence that the defendant was notified of the loss accruing to the plaintiff under the policy filed in this case, and that the said policy was renewed or continued by the

said defendant so as to be a subsisting policy at the time the said loss occurred, the plaintiff is entitled to recover whatever loss it may prove covered by the policy and within the limits of the sum mentioned therein, even although they shall believe that the proof of said loss required by the conditions of the said policy were not made, *provided* they shall further believe from the evidence that within the time mentioned in the said policy for the said proofs, the defendant declined to pay the said loss on other grounds than the failure of the plaintiff to furnish the said proof. *Sheppard v. Insurance Co.*, 21 W. Va. 376.

II. LIFE INSURANCE.

- a. Cancellation of policy by insurer.
- b. Statute of limitations—Plea of by insurer.

a. Action by insurer for cancellation of policy—Recovery of premiums paid by policy-holder—How amount insurer entitled to to be determined.

The court instructs the jury that unless they believe from the evidence that the amount of money paid by the plaintiff on the policy during the time it continued in effect exceeded the equitable annual premiums to which the company was entitled for carrying the risk on plaintiff's life during the time the policy was in force, then they will find for the defendant. *Abell v. Insurance Co.*, 18 W. Va. 411.

b. Plea of statute of limitations by insurer—What insured required to show in support of replication to plea of statute of limitations.

The court instructs the jury that to sustain the replication (marked No. 1) to the plea of the statute of limitations, it was necessary for the plaintiff to prove that the

defendant resided in this state by being represented by a resident-agent, so that process could be served on it at some period of time previous to the time that the cause of action set forth in the declaration accrued, and that unless they believe from the evidence that the defendant was at one time a resident of this state, then they will find for the defendant on the issue joined upon said replication. *Abell v. Insurance Co.*, 18 W. Va. 411.

III. ACCIDENT INSURANCE.

- a. Medical treatment of insured by agent of insurer—
Liability for negligence in.
- b. Same.
- c. Same—When not at the instance of insured.
- d. Same.—When at the instance of insured.
- e. Same.
- f. Same—When physician of insurer exceeds his authority—Scope of authority of.

a. Medical treatment of insured by agent of insurer— Liability for negligence in.

The court instructs the jury that if they believe from the evidence that Dr. ———, as the agent and representative called upon the plaintiff by reason of the provision in the insurance policy issued by the defendant to the plaintiff, authorizing the defendant to have its surgeon make such examination as he deemed proper, and that the said Dr. ———, acting under said provision, did make an examination of plaintiff's foot and ankle and that said Dr. ——— made such examination and negligently and improperly failed to replace the plaster cast removed by him, and that such examination or failure to replace such cast, or a similar support, resulted in an injury to the plaintiff, then you should find for the plaintiff and assess his damages at

what you deem proper under all the circumstances. *Tompkins v. Insurance Co.*, 53 W. Va. 490.

b. Same.

The court instructs the jury that if you believe from the evidence that the examination required in the insurance policy issued by defendant to plaintiff, comprehended and included by the practice of reasonably skilled surgeons, such an examination as would leave the injury to plaintiff's foot and ankle and the cast about such injury, in the same condition in which it was found by the defendant's surgeon, Dr. ———, who made such examination, and the said surgeon failed to leave said foot and ankle, and such cast and treatment therefor, in the condition in which he found them, and that by reason of such failure on the part of said surgeon an injury resulted to the plaintiff, then the defendant is liable therefor. *Tompkins v. Insurance Co.*, 53 W. Va. 490.

c. Same—When not at the instance of the insured.

The court instructs the jury that if they believe from the evidence that the defendant, through its agent, acting upon his own judgment, and not at the request or at the instance of the plaintiff, removed the plaster dressing from the plaintiff's foot before the plaintiff had entirely recovered, and without replacing said dressing, or substitute therefor, directed the plaintiff to use his foot, and that the use of the foot as directed without any bandages, support or dressing, caused the injuries complained of, then the defendant is responsible for all damages sustained by the plaintiff, directly caused by the removal of the dressing and the use of the foot as aforesaid. *Tompkins v. Insurance Co.*, 53 W. Va. 491.

d. Same—When at the instance of insured.

The court instructs the jury that if they believe from

the evidence that the plaintiff at the time of the removal of the plaster cast from his foot, requested said Dr. ——— to treat him for his injury, and that the said Dr. ———, upon request and with the consent of the plaintiff and not at the instance and with the approval of said Dr. ———, removed said cast, and then gave plaintiff directions how to treat and use his said injured foot, that then the plaintiff is not entitled to recover in this action, and the jury should find for the defendant. *Tompkins v. Insurance Co.*, 53 W. Va. 494.

e. Same.

The court instructs the jury that if they believe from the evidence that the injury complained of was the result of treatment by Dr. ——— at the request of the plaintiff, and not at the instance and upon the advice of said Dr. ———, then the plaintiff cannot recover. *Tompkins v. Insurance Co.*, 53 W. Va. 494.

f. Same—When physician of insurer exceeds his authority—Scope of authority of.

The court instructs the jury that the principal is not responsible for the acts of its agent outside of the scope of his agency, and that all parties dealing with an agent are bound to know the scope of the agency, and if the jury believe from the evidence that the authority and power of Dr. ———, from the defendant company was limited, to an examination of and report upon the injuries sustained by the plaintiff, and plaintiff was bound to ascertain the extent of said Dr. ———'s authority to represent the defendant company, and in so far, if at all, he permitted any action by, or acted upon any advice of said Dr. ———, not embraced in said authority, he cannot for such advice or action, or for injuries resulting therefrom, recover damages from the defendant. *Tompkins v. Insurance Co.*, 53 W. Va. 494.

CHAPTER 41.

INTOXICATING LIQUORS.

- a. Receiving orders for sales of intoxicating liquors.
- b. Unlawful sales to minors—Who may maintain suit because of.
- c. Unlawful sales to husbands—Exemplary damages.

a. Receiving orders for sales of intoxicating liquors.

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant received from ——— and order for ——— gallons of intoxicating liquors in the said county of ———, within one year next preceding the finding of the indictment, then you must find the defendant guilty. *State v. Swift*, 35 W. Va. 544.

b. Unlawful sales to minors—Who may maintain suit because of.

The court instructs the jury that if the mother of a minor son has been injured in her means of support by the intoxication of such son, caused in whole or in part by intoxicating liquors unlawfully sold to him by a liquor dealer, the mother has a right of action against the person making such sale, although at the time of such injury she may be living with her husband, on whom she depends in part for support. *McMaster v. Dyer*, 44 W. Va. 645.

c. Unlawful sales to husband—Exemplary damages.

The court instructs the jury that if they believe from the evidence that the plaintiff was injured in her means of support in consequence of the intoxication, habitual or otherwise, of her husband, caused in whole or in part

by the unlawful selling or giving intoxicating liquors to him by ———, they shall find for the plaintiff for all damages sustained and for exemplary damages. *Mayer v. Frobe*, 40 W. Va. 246-258, overruling *Pegram v. Stortz*, 31 W. Va. 220.

CHAPTER 42.

LANDLORD AND TENANT.

- a. As to releasing tenant from payment of rent—Concerning independent covenant requiring landlord to make repairs.
 - b. Injuries to tenant's property caused by defective plumbing.
 - c. Same—How damages estimated.
-
- a. When tenant not released from payment of rent by failure of landlord to make repairs—Independent covenant requiring landlord to make repairs.

The court instructs the jury that the defendants are not released from the payment of any rent by the plaintiff's failure to repair the roof. His agreement to do so was an independent covenant and the defendants could only recover on account of the breach thereof such damages by reason of the breach as they might show in evidence to the jury. No such damages have been pleaded or proven in this proceeding, and therefore none can be allowed. *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 484.

- b. Injuries to tenant's property caused by defective plumbing.

The court instructs the jury that if they believe from the evidence that the plaintiff was a tenant of the defend-

ant, and that in consequence of the defective plumbing or want of repairs, or negligence of the defendant, the plaintiff suffered an injury to his property without any fault of his own, then the plaintiff is entitled to recover damages for the injury sustained in consequence thereof. *Michaelson v. Cautley*, 45 W. Va. 534.

c. **Same—How damages estimated.**

The court instructs the jury that should they find that the defendant is liable to the plaintiff, that the measure of damages for the injury done is that amount that will compensate and make the plaintiff whole—the difference in value of the property injured between that which was immediately before the injury done, and that afterwards. *Michaelson v. Cautley*, 45 W. Va. 534.

CHAPTER 43.

LARCENY.

- a. Essentiality of identity of goods stolen.
- b. Unwilling relinquishment of possession of goods not essential—Obtaining goods by false representations.
- c. Ownership of goods—What deemed sufficient to establish.
- d. Person charged with burglary may be convicted of larceny.

a. **Essentiality of identity of goods stolen.**

The court instructs the jury that one of the essential questions involved in this case is the identity of the ——— alleged in the indictment to have been stolen; and before the jury can convict the prisoner the identity of the

——— must be proved beyond all reasonable doubt. *State v. Belknap*, 39 W. Va. 430.

- b. **Unwilling relinquishment of possession of goods not essential—Obtaining goods by felonious false representations—Felonious conversion of goods without consent of owner.**

The court instructs the jury that there may be larceny even though the possession of the property stolen was willingly relinquished by its owner and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant obtained possession of ——'s money by means of false representations with felonious intent at the time of stealing it, and after obtaining its possession he feloniously converted the same to his own use without the consent of ——, they should find the defendant guilty. *State v. Edwards*, 51 W. Va. 231.

- c. **What deemed sufficient to establish ownership of goods.**

The court instructs the jury that the ownership or right of property in the ——, in the indictment named, is sufficiently laid in ——, provided the jury believe from the evidence, beyond a reasonable doubt, that ——, at the time of the commission of the alleged offense, had the actual or constructive possession or general or special property in the whole or any part of the ——, and that said —— was a person competent by law to hold the property in her own name. *State v. Heaton*, 23 W. Va. 776.

- d. **When person charged with burglary may be convicted of larceny.**

The court instructs the jury that although they should believe from the evidence that no dwelling house was broken or entered, as alleged in the indictment, yet if

they believe from the evidence that the defendant stole and carried away any of the goods of ———, as alleged in the indictment, then they should find him guilty of the larceny of said goods. *State v. Williams*, 40 W. Va. 269.

CHAPTER 44

LIBEL AND SLANDER.

- a. Matter published in course of judicial proceedings.
- b. Same—Malice towards plaintiff.

a. Matter published in course of judicial proceedings.

The court instructs the jury that if they believe from the evidence that the libelous matter complained of by the plaintiff, was composed and published only in the due course of judicial procedure by the defendants, and that said defendants had reasonable cause for believing, and did actually believe, that the said matter was pertinent to the case they sought to make, and the relief they prayed for, then the jury will find for the defendants. *Johnson v. Brown*, 13 W. Va. 149.

b. Same—Malice towards plaintiff.

The court instructs the jury that if they believe from the evidence that the libelous matter, complained of by the plaintiff, was regularly composed and published by the defendants in the due course of judicial procedure, they will find for the defendants, unless they are satisfied from the evidence, that such composing and publishing was done by the defendants with actual malice towards the plaintiff. *Johnson v. Brown*, 13 W. Va. 150.

CHAPTER 45.**LIMITATION OF ACTIONS.**

- a. Action in ejectment—Breach of covenant—Plea of statute of limitations.
- b. Action to cancel life insurance policy—Replication to plea of statute of limitations.

a. Action in ejectment—Breach of covenant—Plea of statute of limitations.

The court instructs the jury that if they believe from the evidence that at the time of conveyance from the defendant to ———, shown in evidence, and bearing date on the ——— day of ——— 18—, that the part of the land thereby attempted to be conveyed, embraced by the alleged interlock or lap with the ——— survey of ——— acres, now claimed by the trustees of ———, was in the actual possession of those under whom said ——— claims by a title paramount to the title conveyed by said ——— to ———, then there was a breach in said covenant in said conveyance *eo instanti*, and if more than ten years elapsed from that time before the bringing of this suit, the action is barred, and the jury should find for the defendant. *Ilseley v. Wilson*, 42 W. Va. 763.

b. Action to cancel life insurance policy—Replication to plea of statute of limitations.

The court instructs the jury that to sustain the replication (marked No. 1), to the plea of the statute of limitations, it was necessary for the plaintiff to prove that the defendant resided in this state by being represented by a resident agent, so that process could be served on it at some period of time previous to the time that the cause of action set forth in the declaration accrued, and unless they believe from the evidence that the defendant

was at one time a resident of this state, then they will find for the defendant on the issue joined upon said replication. *Abell v. Insurance Co.*, 18 W. Va. 411.

CHAPTER 46.

LOGS AND LOGGING.

- a. What passes title to logs.
 - b. Deficiency in quantity delivered—Effect of.
 - c. Same—Place of delivery.
 - d. Time of delivery—Quantity required to be delivered.
 - e. Rules for measurement of timber.
 - f. Same—Measurement of logs without reducing to a square.
 - g. Same—Rules for measurement in absence of special contract.
- a. What passes title to logs—What vests title to logs in purchaser.

The court instructs the jury that if they believe from the evidence that a part of the ——— rafts of timber levied upon by virtue of executions in favor of the bank of ——— against ——— was hauled to the banks of the drifting or splashing water, was there measured and branded by ——— & Co., under the contracts read in evidence dated respectively, ———, ———, and ———, ———, and was drifted to and rafted at the mouth of ——— creek, then such timber passed to and became the property of ——— & Co., and the jury should so find by their verdict. *Bank v. Napier*, 41 W. Va. 491.

- b. Deficiency in quantity delivered—Effect of.

The court instructs the jury that under the written contract in this case the defendant was required to de-

liver for the plaintiff not less than —— feet of —— timber, of the quality and dimensions mentioned in the contract, by the —— day of ——, 18—, on the banks of —— river, secure from high water; and if the jury believe from the evidence that there was an essential deficiency in the quantity to be delivered, then the plaintiff was not bound to accept or pay for the said amount of timber there delivered, and the jury cannot find anything in favor of the defendant against the plaintiff on account of said timber, nor can the jury offset the same against the demand of the plaintiff. *Lumber Co. v. Ward*, 36 W. Va. 576.

c. Same—Place of delivery.

The court instructs the jury that under the written agreement in this case the defendant was required to deliver for the plaintiff not less than —— feet of —— timber of the quantity and dimensions mentioned in the agreement, on the banks of —— river, secure from high water; and if the jury believe from the evidence that such timber as was delivered was not delivered secure from high water, then the jury can not find anything in favor of the defendant against the plaintiff on account of such timber, although the jury may believe it was afterwards carried away by high water. *Lumber Co. v. Ward*, 36 W. Va. 576.

d. Time of delivery—Quantity required to be delivered.

The court instructs the jury that if they believe from the evidence that the defendant was to furnish at least —— feet of —— logs, to average —— inches at the top of the log and not to be less than —— inches, on the —— day of ——, 18—, and that said defendant failed to have that quantity of —— timber on the banks of ——, according to the contract, then the plaintiff was not bound to accept and pay for the whole amount, or any

part thereof; and the jury can not find anything for the defendant for any logs that may have been put on the banks of ———, less than the quantity required by the contract. *Lumber Co. v. Ward*, 36 W. Va. 577.

e. Rules for the measurement of timber—Agreement of parties as rule of measurement.

The court instructs the jury that if they believe from the evidence that the plaintiff and the defendant agreed upon a rule of measurement by which the contents of the timber in the contract was to be ascertained, they should adopt that rule in ascertaining the amount of cubic feet sold to the defendant. *Johnson v. Burns*, 39 W. Va. 667.

f. Same—Measurement of logs without reducing to a square.

The court instructs the jury that if they believe from the evidence that the plaintiff and the defendant, at the time of the sale of the timber specified in the contract offered in evidence to the jury, agreed that in the measurement of said timber the solid contents thereof should be estimated without reducing the logs to a square, then the rule given by Scribner, commencing on page 64 of this book, would be applicable in estimating the quantity of the timber sold. *Johnson v. Burns*, 39 W. Va. 667.

g. Rules for measurement in absence of special contract.

The court instructs the jury that if they believe from the evidence that there was no special contract between the parties as to the mode of measuring and ascertaining the cubic feet in the timber sold by the plaintiff to the defendant, then, in the ascertainment of the contents of the logs and timber involved in this suit, it must be by Scribner's rule, "cubic measurement," "round timber, reduced to square timber." *Johnson v. Burns*, 39 W. Va. 664.

CHAPTER 47.

MALICIOUS PROSECUTIONS.

- a. Malice and want of probable cause shown.
 - b. Same—What to be considered in determining.
 - c. Malice—Definition of—Necessity for existence of.
 - d. Probable cause—Definition of.
 - e. Probable cause—Consideration of what necessary to constitute.
 - f. Same—Want of—Expense incurred in defense of prosecution.
 - g. Same—Acquittal of charge *prima facie* evidence of want of.
 - h. Same—Acquittal of charge not conclusive evidence of want of.
 - i. Same—Existence of.
 - j. Same—When party acting under advice of civil officer.
 - k. Same—What necessary to establish conspiracy.
 - l. Merger of right of action.
 - m. Waiver of preliminary examination *prima facie* evidence of guilt.
-
- a. Malice and want of probable cause must be concurrently shown.

The court instructs the jury that in order to entitle the plaintiff to recover in this action he must prove affirmatively to the satisfaction of the jury by a preponderance of evidence, the defendants sued out the warrant against the plaintiff without any reasonable or probable cause therefor, and also that in so doing they were actuated by malice toward the plaintiff, and that unless the want of probable reasonable cause and malice concurred, at the

time said warrant was sued out, the plaintiff cannot recover. *Vinal v. Core*, 18 W. Va. 62.

b. Same—What to be considered in determining.

The court instructs the jury that the jury in considering the question of malice, as well as probable cause, should consider the information given on oath by the defendant to the justice, who issued the warrant, at the time of issuing the said warrant for the plaintiff's arrest, derived by the defendant from others; that if the jury are satisfied that the defendant believed such information as he received from another person to be true, that there was probable cause for said defendant causing such warrant to issue. *Sisk v. Hurst*, 1 W. Va. 55.

c. Malice—Definition of—Necessity for existence of.

The court instructs the jury that whether the defendants have been actuated by malice is a question of fact to be determined by the jury only; and in determining it they should consider all the facts and circumstances in the case, and unless they find that the defendants were actuated by malice, they cannot find a verdict against them. But by malice is not meant merely malignity or ill will, but it includes every sinister or improper motive, that is, every motive other than a desire to bring punishment to a party believed to be guilty of a crime. If for instance in this case the defendants were in whole, or in part, actuated by a desire to obtain possession of the oil, alleged to have been stolen, they must in law be held to have been actuated by malice. *Vinal v. Core*, 18 W. Va. 74.

d. Probable cause—Definition of.

The court instructs the jury that probable cause is a state of facts actually existing known to the prosecutors personally or by information derived from others, which

would justify the prosecution, that is, which in the judgment of the court would lead a reasonable man of ordinary caution, acting conscientiously on these facts, to believe the party guilty. *Vinal v. Core*, 18 W. Va. 68.

e. Probable cause—Consideration of what necessary to constitute.

The court instructs the jury that to constitute the crime of larceny as charged against the plaintiff, ———, it must have been shown that plaintiff, with a felonious intent, did take, steal and carry away the ——— in question from the possession of ——— or his agents with intent to convert the said ——— to his, plaintiff's, own use; and if the said ——— was not, in fact, in the possession or under the control of said ——— or of his agents, then the removing of said ——— by the said ———, (plaintiff) and its conversion to his own use did not constitute larceny; and if the defendants knew that said oil was not in fact in the possession or under the control of the said ——— (one of the defendants) and his agents, when it was removed by ———, (plaintiff) then such removal did not constitute probable cause for the prosecution of the plaintiff, and the jury may presume that the defendants knew that said oil was not in fact in the possession or under the control of said ———, (one of the defendants) or his agents, when so removed, from the mere existence of this fact, if it be found by the jury to have existed, unless they prove to the satisfaction of the jury, that they, (defendants) did not know this fact. *Vinal v. Core*, 18 W. Va. 72.

f. Same—Want of—Expense incurred in defense of prosecution.

The court instructs the jury that although no actual damages may have been proven by the plaintiff in this case as to actual attorney fees and expenses about his

defense in the prosecution commenced or pursued against him by the defendant in this case, and although he may have proven no actual damages for loss of time because of the prosecution against him, but of all this the jury are to judge from the evidence in the case, yet the jury may give such damages as they think proper for injury to the plaintiff's feelings, person and character by his detention in custody and prosecution, if they believe from the evidence that there was a prosecution commenced or pursued against him by the defendant and that said prosecution was instigated by the defendant without probable cause therefor, and with malice express or implied from the want of probable cause, and that the prosecution was conducted to its termination to the final discharge of the plaintiff, without proof as to the amount of such damages, and the jury may give such punitive or exemplary damages as they may think proper, for the conduct of the defendant, if they believe from the evidence in this case that the said prosecution against the plaintiff was commenced or pursued for the private ends of defendant, or if they believe from the evidence that said prosecution was commenced or pursued with reckless disregard of the rights of the plaintiff and may assess such damages without proof as to the amount thereof, the amount not to exceed \$——. *Waldron v. Sperry*, 53 W. Va. 122.

g. Same—Acquittal of charge prima facie evidence of want of.

The court instructs the jury that if they believe from the evidence that the plaintiff was arrested on the warrant, on the charge of grand larceny, was examined on said charge, and after said examination before the justice, as alleged in the declaration, was discharged from prosecution thereon, as alleged, then such discharge is *prima facie* evidence that there was want of probable cause for such criminal prosecution sufficient to throw the burden

of proof on the defendants of rebutting the inference that there was such want of probable cause for charging the plaintiff with the crime set out in the warrant in the declaration mentioned; and if the jury believe from the evidence that there was want of probable cause for charging the plaintiff with said crime, then the jury have the right to infer malice in the defendants. *Vinal v. Core*, 18 W. Va. 69.

h. Same—Acquittal of charge not conclusive evidence of want of.

The court instructs the jury that the acquittal by the justice of the plaintiff of the charge in the warrant, is not in this action conclusive evidence of the want of probable cause; and if the jury believe from the evidence adduced before them, that the facts and circumstances so existed at the time of suing out the warrant created a well-grounded belief of the plaintiff's guilt, as charged in the warrant, then the plaintiff is not entitled to recover. *Vinal v. Core*, 18 W. Va. 66.

i. Same—Existence of.

The court instructs the jury that if they believe from the evidence, the defendant —— had information which, as a prudent man, would lead him to suspect or believe that —— was engaged, with others, in the assault charged, in the said warrant, and that said —— was in company with the other parties, who in fact did make the assault charged in the said warrant, given in evidence in this cause, that these facts and circumstances constitute probable cause for the issuing the said warrant, although it should afterwards appear that the said —— in fact used no violence against —— at the time, and the plaintiff in this suit cannot recover. *Sisk v. Hurst*, 1 W. Va. 55.

j. Same—When party acting under advice of civil officer.

The court instructs that if the jury believe from the evidence in this cause that the said defendant, under oath, detailed to the justice the whole of the information he had derived from another person as to the guilt of the plaintiff, ———, of the charge mentioned in said warrant, and that the defendant believed such information to be true, and such justice, as a conservator of the peace, in his opinion and in discharge of his duty as such justice, advised the issuing of the said warrant, the defendant is not liable in this action. *Sisk v. Hurst*, 1 W. Va. 55.

k. Same—Conspiracy—What necessary to establish.

The court instructs the jury that in order to entitle the plaintiff to recover against the defendant, ———, the jury must believe from the evidence that the warrant was sued out by him, or counseled and advised by him, or that he voluntarily participated in the prosecution, and that it was carried on with his countenance and approval, or that he unlawfully entered into a conspiracy with his co-defendant, ———, to have said warrant issued without reasonable or probable cause therefor and with malice toward the plaintiff. *Vinal v. Core*, 18 W. Va. 62.

l. Merger of right of action.

The court instructs the jury that all the rights of action which the plaintiff ever possessed, by reason of the breach of the defendants of the contract described in the declaration of the plaintiff in the suit in evidence brought by him and tried in the circuit court of the United States, in the district of West Virginia, the record of which is in evidence in this case, have been merged in the judgment rendered in the said circuit court of the United States, and that no further action or recovery can be had by rea-

son of the failure of the defendants in this suit, or either of them, to perform the said contract. *Porter v. Mack*, 50 W. Va. 596.

m. Waiver of preliminary examination prima facie evidence of guilt.

The court instructs the jury that if they believe from the evidence that the plaintiff was arrested upon a warrant issued upon a complaint made by the defendant and taken before a justice for examination, and that the plaintiff waived such examination and entered into a recognizance to answer an indictment upon the matter charged in said complaint, then such waiver is *prima facie* evidence that there was at least probable cause sufficient to justify the defendant in making the said complaint. *Brady v. Stiltner*, 40 W. Va. 296

CHAPTER 48.

MARRIED WOMEN.

- a. How married women may carry on business—Exceptions.
 - b. When property of married woman liable for debts of husband.
 - c. Defective acknowledgments of married women.
-
- a. How a married woman may carry on business—Must have separate estate or live separate and apart from husband.

The court instructs the jury that, unless living separate and apart from her husband, a married woman cannot carry on any business unless she has separate estate, and

if the jury find that Mrs. ——— had no separate estate in 18—, when the two farms that she claims to have been renting were rented, and that the property now on said farms and levied upon has been acquired by her [earnings in carrying on the business] of farming, either with or without the assistance of her husband, and that she has not since that time been living separate and apart from her husband, then the jury will find the property thus acquired is the property of her husband [unless they believe she became possessed of a separate estate since the year 18—, by gift or otherwise, from a person other than her husband.] *Trapnell v. Conklyn*, 37 W. Va. 256.

b. When property of married woman liable for her husband's debts.

The court instructs the jury that the property acquired by the earnings of a married woman [having no separate estate] or the combined earnings of her and her husband during coverture, belong to the husband and are liable for his debts, and if they find from the evidence that the property levied on under the executions in this case, or any part thereof, was produced or acquired by the labor, skill or occupation of Mrs. ———; either with or without the assistance of her husband during coverture, if they find she is married, then any such property thus acquired is the property of her husband and is liable for his debts [unless they believe that during coverture she acquired a separate estate by gift, grant or devise from some person other than her husband or the proceeds thereof.] *Trapnell v. Conklyn*, 37 W. Va. 256.

c. Defective acknowledgements of married women.

The court instructs the jury that the deed executed by ——— to ———, bearing date ———, offered in evidence, and purporting to be also signed by ———, and purporting to be also acknowledged by ———, wife of the said

———, is a good deed for the purpose of conveying the interest of ——— in the land therein mentioned. And the court also instructs the jury that if they believe from the evidence that the said ———, at the time of the execution and acknowledgement of said deed, was the wife of the said ———, then the said deed is not valid, so far as it purports to be her deed, and does not convey any interest she may have had in said land, and cannot operate against her or her grantees by way of estoppel. *Laidley v. Land Co.*, 30 W. Va. 509.

[NOTE.—This was under the statute requiring separate acknowledgment of married women.]

CHAPTER 49.

MASTER AND SERVANT.

1. NATURE AND EXTENT OF MASTER'S LIABILITY.
2. MACHINERY, APPLIANCES, MATERIAL AND PLACE TO WORK.
3. ROADBEDS AND TRACKS.
4. WARNING, INSTRUCTING AND GIVING ORDERS TO SERVANTS.
5. FELLOW SERVANTS.
6. RISKS ASSUMED BY SERVANTS.
7. CONTRIBUTORY NEGLIGENCE.

1. NATURE AND EXTENT OF MASTER'S LIABILITY.

- a. Care required in general.
- b. Same—Character of employment.

- c. Measure of care—Definition of.
- d. Ordinary care—Definition of.
- e. Wrongful dismissal of servant—Duty of servant.
- f. When master not guarantor against accidents.

a. Care required in general.

The court instructs the jury that it was the duty of the defendant to use all reasonable care and diligence for the safety of its employes, and that the plaintiff, in entering into the service of the defendant, had a right to presume that the defendant had discharged this duty, and the plaintiff on entering the employment, is presumed to have assumed only those ordinary risks connected with his duties which would exist after the discharge by the defendant of the duty above set out; and if the jury believe from the evidence that the defendant failed to discharge such duty, and that the injury complained of resulted to the plaintiff from such failure, without fault or negligence on the part of the plaintiff at the time of the injury, which ordinary care and prudence on his part could have avoided; then the defendant is liable for such injury. *Skidmore v. Railroad Co.*, 41 W. Va. 296.

b. Same—Character of employment.

The court instructs the jury that if they believe from the evidence that the railroad of the defendant upon which the plaintiff was employed when he was injured was a new road; that it was built alongside of a precipitous mountain, with a side-cut most of the way on one side, and was open on the other side next to ——— run; that by reason of it being a new road, and by the character of the country through which it passed, the service upon said road was more dangerous than it would otherwise have been, and if they believe that the plaintiff knew that it was a new road and the character of the country

through which it passed; and if they further believe from the evidence that the defendant used such care in the construction of its road and keeping it in repair and in a safe condition as an ordinary, prudent man would use in his own business, then the law is that when the plaintiff entered into the service of the defendant, he took upon himself all the risks incident to such service, but not those caused by the want of such care on the part of the defendant. *Riley v. R. R. Co.*, 27 W. Va. 152.

c. Measure of care—Definition of.

The court instructs the jury that the measure of care which should have been taken by the defendant company to avoid a responsibility of the injury to the said ——— is that which a person of ordinary care, prudence and caution would use if his own interests were to be effected, or the whole of the risk were his own. It is such care as a person of ordinary prudence would exercise under the circumstances surrounding the accident at the time of the injury. *McVey v. St. Clair Co.*, 49 W. Va. 420.

d. Ordinary care—Definition of.

The court instructs the jury that by "ordinary care" is meant such watchfulness, caution and foresight as, under all the circumstances of the particular service, a corporation controlled by prudent and careful officers ought to exercise. *Woodell v. Improvement Co.*, 38 W. Va. 34.

e. Wrongful dismissal of servant—Duty of servant as to seeking other employment—Effect of.

The court instructs the jury that if a person is hired for service for a given term and is wrongfully dismissed the law imposes upon him the duty to seek other employment, and to the extent that he obtains it and earns wages, or

might have done so, his damages are reduced. *Grover v. Railroad Co.*, 53 W. Va. 107.

f. When master not guarantor against accidents.

The court instructs the jury that if they believe from the evidence that the defendant exercised reasonable care in the selection of ——— for supervisor of its road and of ——— as section foreman, and that they, or either of them, provided for the work done, reasonably safe appliances or instruments for doing such work, then there was no absolute guaranty against accident in the use of such appliances or instruments, and the jury should find for the defendant, unless they believe from a preponderance of the evidence, that the defendant was negligent in some other respect and that such negligence was the proximate cause of the injury. *Skidmore v. Railroad Co.*, 41 W. Va. 300.

2. MACHINERY, APPLIANCES, MATERIAL AND PLACE TO WORK.

- a. Machinery and appliances.
- b. Same—Defects in—Knowledge of master of.
- c. Machinery, appliances and place to work.
- d. Same—Latent defects—Master not liable for.
- e. Same—Delegation of duties.
- f. Same—Presumptions to be overcome by servant.
- g. Place to work—Examination of.
- h. Same—Failure to make examination of.
- i. Same—Master's knowledge of danger.
- j. Material—Defects in.
- k. Same—Defective workmanship.
- l. Foreman—Liability of master for negligent acts of.

a. Machinery and appliances—Character of required to be furnished.

The court instructs the jury that the defendant was not

bound to furnish to the plaintiff the safest and best appliances and machinery used, with which to work, but the defendant should be acquitted of fault in this respect, if the appliances and machinery which they did furnish the plaintiff were reasonably safe and suitable. *Giebell v. Collins Co.*, 54 W. Va. 526.

b. Same—Defects in—Knowledge of master of.

The court instructs the jury that if they believe from the evidence and circumstances that the defendant knew, or by the exercise of due care and caution would have known, that the said chain was not of sufficient strength to bear the pressure necessary to be brought upon it in performing the work required to be done by the plaintiff, and further, that the same was not sufficient, then the defendant was guilty of negligence and liable to the plaintiff in damages, not exceeding the sum laid in the declaration, unless they further believe from all the evidence and circumstances, to their satisfaction, that the plaintiff also knew, or by the exercise of due care and caution would have known that the said chain was insufficient to bear the pressure necessary in the performance of the work aforesaid. *Hoffman v. Dickinson*, 31 W. Va. 150.

c. Reasonably suitable and safe machinery and appliances and safe place to work—Duty of master to furnish.

The court instructs the jury that it is the direct, personal and absolute obligation of the master to provide reasonably safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances. The master must furnish a safe place in which his servant is to work. And the jury are further instructed that a master is liable for any injury to his servants, due to the neglect or failure

of the master to provide such safe and suitable machinery and appliances for the business, or to exercise such reasonable care in furnishing such appliances, or to furnish his servants a safe place in which to work. *Giebell v. Collins Co.*, 54 W. Va. 525.

d. Latent defects master not liable for.

The court instructs the jury that it was the duty of the defendant to provide the brakeman, ———, with sufficient and safe machinery and appliances to be used in the course of his employment; and if the jury believe from the evidence that he received the injuries that resulted in his death from defects in such machinery or appliances, while using them in the regular course of his employment, and that such defects were unknown to him, but that the defendant in the exercise of ordinary and reasonable care and diligence could have cured them, then the defendant is liable therefor; but if they believe that such defects were latent and not discernible by ordinary and reasonable care and diligence, and also that they were unknown, then the defendant is not liable. *Cooper v. Railroad Co.*, 24 W. Va. 42.

e. Same—Delegation of duties by master—Liability of master.

The court instructs the jury that the duties of the master to provide safe and suitable machinery and appliances for the business and to furnish a safe place in which his servant is to work, are duties which the master can either perform personally or delegate their performance to some one else; but if both the master and the person to whom such duties are delegated fail in the performance of any of said duties, and injury results to the servant by reason of said failure, the master is liable for such injury. *Giebell v. Collins Co.*, 54 W. Va. 525.

f. Same—Presumptions to be overcome by servant.

The court instructs the jury that before the plaintiff can recover from the defendant in this case, for the loss of his hand while in said company's employ, he must overcome two presumptions: First, the presumption that the defendant did provide safe and suitable machinery and a safe and suitable place in which to work; second, that the plaintiff assumed all the usual and ordinary hazards of the business in which he was engaged, and that unless the plaintiff does overcome the said presumptions by a preponderance of the evidence you will find for the defendant. *Giebell v. Collins Co.*, 54 W. Va. 526.

g. Place for servant to work—Examination of required of master.

The court instructs the jury that if they believe from the evidence that the defendant company, or mining boss, did not make the proper examination of the particular entry or room in the mines where — was killed, and that — was killed in consequence of such neglect, and without any fault on his own part, then, in the absence of proof of contributory negligence on the part of deceased, the defendant is liable. *Davis v. Coal Co.*, 34 W. Va. 509.

h. Same—Liability of master for failure to make examination of.

The court instructs the jury that if they believe from the evidence that — was killed by reason of an unsound, unsafe and defective roof under which he was working, and that the defendant neglected and failed to have said roof carefully inspected by persons competent to perform that duty, and that the plaintiff did not directly contribute to the injury, then the negligence of such person is the negligence of the company and the company is liable. *Davis v. Coal Co.*, 34 W. Va. 510.

i. **Same—Master's knowledge of danger—Entering dangerous place by servant under direction of master.**

The court instructs the jury that if they believe from the evidence that the defendant company, or any person in authority representing the company in this respect, had knowledge of the danger, and could, by due care and diligence, have known the danger, and that the deceased was ignorant of the danger, and was without fault on his own part, and that the defendant company lulled the deceased into a sense of security by requesting, directing or ordering him to drive a mule to haul coal in a certain dangerous entry of the mines of the defendant company, and the said deceased, acting under such order or direction, did drive such mule in such entry, and that the death of said ——— was caused by such danger, then the defendant company was guilty of negligence. *Davis v. Coal Co.*, 34 W. Va. 510.

j. **Material—Defects in—Duty of master to furnish reasonably safe and sound material.**

The court instructs the jury that the law imposes upon the defendant company the duty of furnishing its employe with reasonably safe and sound material with which the employe may be engaged in and about the doing and performing of his work, and a failure of the defendant company to discharge this duty is, in the law, negligence for which the company is liable. Therefore, in this case, if the jury believe from the evidence that the scaffold upon which the plaintiff's decedent was working, by reason of weakness or defectiveness in the material of which it was constructed, was not sufficiently strong to support itself, together with the weight that the scaffold was sustaining by the work then and there being done by the plaintiff's decedent in the course of his duties, and that by reason of such weakness or defectiveness the said scaffold fell, and thereby injured the plaintiff's decedent and caused

his death, then it is the duty of the jury to find for the plaintiff. *Richards v. Iron Works*, 56 W. Va. 519.

k. Same—Defective workmanship—Accident caused by though best material be used.

The court instructs the jury that if they believe from the evidence that the same injury would have resulted to the plaintiff's intestate even if the best of material had been used, unless the jury believe the accident resulted from defective workmanship in the manner in which scaffold was put together, then they must find for the defendant. *Richards v. Iron Works*, 56 W. Va. 524.

l. Foreman—Liability of master for negligent acts of.

The court instructs the jury that if they believe from the evidence that the witness ——— was put in charge of the construction of the scaffold in question, and of the men constructing the same, by the defendant, then his acts in the performance of his duties as a foreman in the construction of said scaffold were the acts of the defendant company, and the defendant is liable for any negligence or want of proper care on his part, or the workmen in his charge, in the selection of the timber or the construction of said scaffold. *Richards v. Iron Works*, 56 W. Va. 519.

3. ROADBEDS AND TRACKS.

- a. Railroad tracks—Duty of master to keep clear of dangerous obstructions.
- b. Same—Roadbeds and tracks.
- c. Same—Presumption as to master's knowledge of.
- d. Same—Right of servant to presume that obstruction would be removed.
- e. Same—Machinery and structures—Duty of master as to safety of.

a. **Railroad tracks—Duty of master to keep clear of dangerous obstructions—What servant has right to presume.**

The court instructs the jury that it was the duty of the defendant to use all reasonable care and diligence for the safety of its employes and to keep its track clear from obstructions immediately thereon or so near thereto as to be dangerous, and that the plaintiff in entering into the service of the defendant, had a right to presume that the defendant had discharged this duty, and the plaintiff in entering the employment is presumed to have assumed only those ordinary risks connected with his duties which would exist after the discharge by the defendant of the duty above set out. And if the jury believe from the evidence that the defendant failed to discharge such duty, and that the injury complained of resulted to the plaintiff from such failure, without fault or negligence on the part of the plaintiff at the time of the injury, which ordinary care and prudence on his part could have avoided, then the defendant is liable for such injury. *Riley v. R. R. Co.*, 27 W. Va. 150.

b. **Same—Roadbeds and tracks.**

The court instructs the jury that it was the duty of the defendant railroad company to keep its roadbed and track in a reasonably safe condition for the passage of its train along and over the same, and to keep the same clear of obstructions thereon, or in close and dangerous proximity thereto; and if the jury believe from the evidence in this case that there was standing near the defendant's railroad and track at the point where it is alleged in the declaration that the accident herein occurred, a derrick, with an arm or boom attached thereto, and that said arm or boom of said derrick was of sufficient length to swing over the roadbed or track of the defendant, and thereby endanger the passage of trains along and over

said track at said point, then it was the duty of the defendant to either cause said derrick and arm or boom attached thereto to be removed, or to see that the same was kept securely fastened in such a way and manner as not to obstruct the passage of trains along said track at said point. And that this duty be devolved upon the defendant, although said derrick may not have been upon the right of way of the defendant, nor upon lands under its immediate control. *McCreery v. Railroad Co.*, 43 W. Va. 113.

c. Same—Presumption as to—Master's knowledge of.

The court instructs the jury that an employe running on the trains of the defendant has the right to presume that the roadbed is in a reasonably safe condition for the passage of its trains, and that the mere fact that a derrick is standing by the roadside is not notice that it is dangerous, unless the employe, the decedent in this case, had seen it upon the track, or knew it was in the habit of swinging across the track, and after such knowledge continued to run defendant's train without complaint. *McCreery v. Railroad Co.*, 43 W. Va. 114.

d. Same—Right of servant to presume that obstruction would be removed.

The court instructs the jury that although the employe, the decedent, did in fact know of the existence of the derrick in question, and its situation with reference to the roadbed and track, yet the said decedent had the right to presume that the defendant would keep said derrick so secured as to make it reasonably safe, or cause the same to be removed after the completion of the bridge; and it was not such negligence on the part of the said decedent to remain in the employment of the said defendant as would defeat a right of recovery in this case. *McCreery v. Railroad Co.*, 43 W. Va. 115.

e. Same and machinery and structures—Duty of master not to expose servant to perils or hazards.

The court instructs the jury that it was the duty of the defendant not to expose the said ———, as a brakeman on its train of cars and while in its employ, to perils or hazards, against which he could be guarded by proper diligence on defendant's part, and that the said defendant was bound to exercise ordinary care, not only in supplying but in maintaining, for the use of its employes on its said cars, while in its service, sound and suitable machinery, roadway, structures, and instrumentalities, including a safe track. *Woodell v. Improvement Co.*, 38 W. Va. 34.

4. WARNING, INSTRUCTING AND GIVING ORDERS TO SERVANTS.

- a. Young and inexperienced servants — Instructions to.
- b. Representations by servant as to his skill to work.
- c. Same.

a. Young and inexperienced servants—Duty of master who sets servant to work in a place of danger to give notice and instructions to.

The court instructs the jury that it is the duty of the master who sets a servant to work in a place of danger or with dangerous machinery or appliances, to give such notice and instructions as are reasonably required by the youth, inexperience or want of capacity of the servant; and failing to do so, the master is liable for the damage suffered through such failure. *Giebell v. Collins Co.*, 54 W. Va. 525.

b. Same—Representations by servant as to his skill to work.

The court instructs the jury that the fact that the de-

ceased was in the employment of the defendant company as coal loader did not prevent the defendant from employing the deceased to work as a helper on the mine machine, and if the jury believe from the evidence that ——— approached the deceased while he was engaged at his work as coal loader and enquired of him whether or not he had worked upon a mine machine as helper and the deceased informed said ——— that he had so worked, and upon that information the said ——— believing it to be true, requested the deceased to assist him as a helper in running the machine in room No. — to cut it out, and the deceased consented thereto without making any sort of objection, then, although the deceased may have been but seventeen years of age, if the jury believe from the evidence that he was possessed of ordinary intelligence, the said ——— had the right to rely upon the representations of the deceased to him, as to his experience, and if under such circumstances he entered upon the work of assisting to run said mine machine as a helper, the deceased was required to exercise ordinary care to avoid danger and injury to himself while so at work, and the said ——— would not be required to instruct him as to his duties unless it appeared from the manner in which he undertook to perform and did perform the same, that he was incapable of doing it for want of knowledge and information as to what the duties of a helper upon a mine machine were. *McVey v. St. Clair Co.*, 49 W. Va. 422.

c. Same.

The court instructs the jury that if they believe from the evidence that the deceased represented to the said ——— that he had worked upon a mine machine as a helper and that he consented to work as a helper in running the machine to cut out room No. —, and proceeded to do such work, and if the said ——— did not discover before his injury any want of capacity in the said ———,

and the jury believe from the evidence that the said —— was a person of ordinary sense, the defendant cannot be held for the negligence on the part of the said —— under such circumstances. *McVey v. St. Clair Co.*, 49 W. Va. 422.

5. FELLOW SERVANTS.

- a. Superiority in authority.
- b. Brakeman and brakeman.
- c. Precaution required of fellow servants.

[NOTE.—For the law applicable to fellow servants, see *Jackson v. Railroad Co.*, 43 W. Va. 380, overruling numerous prior cases, and *Sanderson v. Lumber Co.*, 50 W. Va. 42, and *Cochran v. Shanahan*, 51 W. Va. 137, approving the *Jackson case*.]

a. When superiority in power and authority does not destroy relationship of fellow-servants.

The court instructs the jury that the fact that the said —— was superior in power and authority over the said —— in the service of the said company at the time of said accident would not, of itself, destroy the relation of co-servant between the said —— and the said —— and if they believe from the evidence that the said —— was capable of running the mine machine, and was working within the scope of his employment at the time of the accident and that the said —— then and there knew how to perform his duties as helper upon the said machine, they would, in that case, be co-servants, and although the jury might believe that the accident resulted from the negligence of the said ——, under such circumstances the plaintiff would not be entitled to recover in this case, and the jury should so find. *McVey v. St. Clair Co.*, 49 W. Va. 421.

b. Master not liable for injury to one brakeman caused by the negligent acts of another.

The court instructs the jury that if they believe from the evidence that the injury to the plaintiff was caused by the negligence of brakeman ———, then in such case such negligence was the negligence of a fellow servant, and for which negligence no recovery can be had against the defendant in this case. *Oliver v. Railroad Co.*, 42 W. Va. 714.

c. Precaution required of servant to prevent injury to himself and fellow-servants.

The court instructs the jury that the decedent, ———, being an employe of the defendant at the time he received the injury from which he died, it was his duty to take ordinary precaution to prevent injury to himself and his fellow-servants, while in the discharge of his duty. *Cooper v. R. R. Co.*, 24 W. Va. 43.

6. RISKS ASSUMED BY SERVANTS.

- a. Risks incident to service—Duty of master.
- b. Same—Negligence of master.
- c. Extraordinary risks.
- d. Risks assumed by minor servants—Duty of master to warn.
- e. Negligence of fellow-servants.
- f. Promulgation of rules by fellow-servants.
- g. Increase of risks—Master's knowledge of danger—
Danger unknown to servant.
- h. Right of servant to rely on care of master.
- i. Patent danger.
- j. Same—When warning as to not necessary.
- k. Opportunity of servant to know danger.
- l. Danger known to servant—Continuing in exposure to danger.

- m. Same—Servant's willful encounter of danger.
- n. Effect of servant not being in proper discharge of duty.
- o. Compensation paid servant in consideration of risks.

a. Risks incident to service—Duty of master.

The court instructs the jury that when a brakeman voluntarily enters the service of a railroad company he takes upon himself the hazards and dangers properly incident to such service; but such a railroad company is nevertheless bound to take all reasonable precautions for the safety of the brakeman. *Cooper v. R. R. Co.*, 24 W. Va. 42.

b. Same—Negligence of master.

The court instructs the jury that a person entering a perilous employment, such as laboring on or near the tracks of a railroad company, himself assumes all the ordinary and usual risks attending the employment, and if he is injured by reason of such ordinary risks, he cannot recover from his employer damages for the injury, but he does not assume the risk of negligence on the part of his employer. *Unfried v. Railroad Co.*, 34 W. Va. 268.

c. Extraordinary risks.

The court instructs the jury that if they believe from the evidence that the injury to the plaintiff was caused by his attempting to make a coupling of two ——— cars, such act of coupling was not exposing the plaintiff to extraordinary risks or hazards not naturally incident to the service of the plaintiff as a brakeman. *Oliver v. Railroad Co.*, 42 W. Va. 712.

d. Risks assumed by minor servant—Duty of master to warn.

The court instructs the jury that while it is a general

rule that an employe accepts service subject to risks incidental to it, and when the appliances or means or methods of work are known to the employe he can make no claim upon the employer to charge them, and if injury results therefrom can recover no damages; yet this does not relieve the employer from the obligation which makes it his imperative duty to warn the employe of danger and instruct him how to avoid the danger, even when the danger is visible and open to observation, if through youth, inexperience or lack of ability, the employe is incompetent to understand fully and appreciate the nature and extent of the danger. *Giebell v. Collins Co.*, 54 W. Va. 526.

e. Negligence of fellow-servant.

The court instructs the jury that a servant entering the employment of a master assumes all the ordinary risks of such employment and service, and one of such ordinary risks so assumed by the servant is that of liability for negligence of a fellow-servant in a common employment of such master. *Daniels v. Railway Co.*, 36 W. Va. 403.

f. Promulgation of rules by fellow-servants.

The court instructs the jury that while it was the duty of the defendant railroad company to make and promulgate proper rules for the protection of its employes yet it was not required that the defendant should see to it, personally, that notice came to the knowledge of all those to be governed thereby, and that if the defendant exercised due care and diligence in choosing competent servants to receive and transmit the necessary rules, the negligence by such servants in the performance of it is a risk of the employment that the plaintiff took when he entered the service of the defendant. *Oliver v. Railroad Co.*, 42 W. Va. 714.

**g. Increase of risks—Master's knowledge of danger—
Danger unknown to servant.**

The court instructs the jury that if they believe from the evidence that there was a ——— standing upon or alongside of the bank of the defendant's railroad in dangerous proximity to the track or cars or engines and tender passing over said track whereby the risk of injury to the plaintiff in the discharge of his duties was increased beyond the ordinary risks incident to such employment, and that said ——— was allowed to remain there after the defendant knew of its situation, or might, by the exercise of reasonable care and diligence, have known thereof, and if they further believe that the plaintiff received the injury complained of in consequence of such ——— having remained there, after the defendant knew or might have known by the use of care and diligence of its situation, and that the plaintiff, at the time he received such injury was exercising ordinary care and prudence as a brakeman and was in the discharge of his duties as such at the time the injury occurred, and did not know of the situation of said ——— or might not have known of it by the exercise of reasonable care and prudence, then the defendant is liable for said injury. *Riley v. R. R. Co.*, 27 W. Va. 150.

**h. Right of servant to rely on care of master—Careless
and needless exposure to risks and danger.**

The court instructs the jury that the plaintiff's intestate had the right to assume his foreman, ———, would give all proper attention to his safety, and that he would not be carelessly and needlessly exposed to risks and dangers not necessarily resulting from his occupation, and which might have been prevented, or much diminished by ordinary care and precaution on the part of his master or his representative. *Turner v. Railroad Co.*, 40 W. Va. 680.

i. Patent danger.

The court instructs the jury that if the deceased voluntarily entered into the service of the defendant as brakeman upon its construction train, then he is held and must be taken to have assumed not only all risks ordinarily incident to the business, but also all other open and visible risks, whether usually incident to the business or not; and if a visible ——— caused his injury, partly over the roadway of the defendant, the fact that he had forgotten its existence, or failed to remember it, and thus suffered the injury, furnishes no excuse for the deceased, and the jury should find for the defendant. *Woodell v. Improvement Co.*, 38 W. Va. 38.

j. Same—When warning as to not necessary.

The court instructs the jury that if they believe from the evidence that it was dangerous for the plaintiff to ride upon the truck upon which he was riding when the accident occurred, and dangerous for him to ride thereon in a standing position, and if they further believe that such danger was obvious to the plaintiff, and was understood and appreciated by him, the fact that the defendant's foreman may have seen the plaintiff, immediately prior to the accident, standing upon the said truck, and may not, at that time, ordered or warned him not to ride thereon, give the plaintiff no right to recover in this action because of such failure to so warn. *Reese v. Railroad Co.*, 42 W. Va. 341.

k. Opportunity of servant to know danger.

The court instructs the jury that if they believe from the evidence in this case that decedent, for two or three months prior to his death, had been in the service of the defendant, under foreman ———, working upon the defendant's railroad track putting in cattle guards, and to his knowledge the railroad company during that time had

been daily running on said road divers extra trains, without previous notice, back and forth from one point to another at regular hours of the day, and that said decedent, without compulsion, got upon the hand car on the morning of ———, knowing that his foreman had no knowledge or opportunity of knowledge that extra No. — would be approaching that morning, and also knew that his foreman had not flagged around the curve where the accident occurred, then the jury are instructed that the said decedent assumed the risk of a collision between his hand car and any extra which might meet them on said curve; *Provided* the jury further believe from the evidence that the decedent had knowledge that it was the duty of said foreman to do or have done such flagging. *Turner v. Railroad Co.*, 40 W. Va. 682.

1. Danger known to servant—Continuing in exposure to danger.

The court instructs the jury that if they believe from the evidence that ——— was a foreman of the defendant in charge of a gang of laborers putting in cattle-guards along defendant's line; that the plaintiff's intestate was a member of such gang, and subject to the authority of said ———; that on the morning of ———, the said decedent, in company with his said foreman and the other laborers of the gang under him, got on the hand car on the defendant's railroad track willingly and without objection, and rode along on said hand car in the direction of ———, through cuts and around curves, without the foreman of the crew, or any member thereof by his direction, being ahead with a flag or other signal to give the hand car and its occupants warning of danger by reason of approaching trains or otherwise, and the absence of such flagging was known to said decedent, and he still without objection remained on the hand car—then, under such circumstances, the said decedent accepted and

assumed the risk of encountering or coming in contact with any extra train or wild engine that might be on the track, and which could be escaped by such flagging; and under such circumstances, if the jury find that the neglect of the foreman to flag was the proximate cause of the injury to the decedent, they can not find for the plaintiff, but must return a verdict for the defendant; *Provided*, the jury further believe from the evidence that the decedent had knowledge of the duties of said foreman to do such flagging, or cause it to be done, and if the jury believe from the evidence that the decedent had knowledge at the time of the accident that said foreman had not so done his duty. *Turner v. Railroad Co.*, 40 W. Va. 682.

m. Same—Servant's willful encountering danger.

The court instructs the jury that if they believe from the evidence that the plaintiff wilfully encountered the dangers of coupling cars, which were known to him or were notorious, that in such case the defendant railroad company is not responsible for an injury occasioned thereby. *Oliver v. Railroad Co.*, 42 W. Va. 712.

n. Effect of servant not being in proper discharge of duty when injury occurred.

The court instructs the jury that if they believe from the evidence that the plaintiff, before the occurrence of the injury complained of, had a reasonable opportunity to know that it was dangerous to lean over on the right hand side of the engine and tender for the purpose of watching the wheels or for any other purpose, and that his injury was caused by his so leaning over, and that in doing so he was not in the proper discharge of his duties, then the plaintiff cannot recover in this action. *Riley v. R. R. Co.*, 27 W. Va. 152.

o. Compensation paid servant in consideration of risks.

The court instructs the jury that a brakeman who enters the employment of a railroad company in consideration of the compensation to be paid him, takes upon himself the ordinary risks of employment, and the railroad company is not the warrantor of the safety of the brakeman. *Cooper v. Railroad Co.*, 24 W. Va. 41.

7. CONTRIBUTORY NEGLIGENCE.

- a. Care required of servants—Perilous positions.
- b. Same—Opportunity and duty of servants to avoid perilous positions.
- c. Obviousness of danger—Preponderance of evidence.
- d. Knowingly assuming place of danger—Failure to avert danger.
- e. Same.
- f. Continuing in service after knowledge of danger.
- g. Minority of servant—Capacity of to contribute to injury.
- h. Same—Knowledge and experience of minor servant.
- i. Right of master to prescribe rules for government of servant.
- j. Agreement of servant to obey rules—Injuries resulting from violation of.
- k. Same.
- l. Servant's knowledge of rules—Injuries resulting from violation of.
- m. Same.
- n. Same—Disobedience of rules.
- o. Same.
- p. Sufficient compliance with rules.
- q. Proximate cause of injury.
- r. Burden of proof—Preponderance of evidence.

s. Right to recover—When not affected by contributory negligence.

t. Same—Preponderance of evidence.

a. Care required of servants—Perilous positions.

The court instructs the jury that although the cars attached to the train on which plaintiff was injured was so crowded on the morning of ———, ———, that plaintiff could not find a seat therein, that fact did not justify him, in order to reach his employment, in getting on the engine of that train in a dangerous or perilous position. *Downey v. Railway Co.*, 28 W. Va. 742.

b. Same—Opportunity and duty of servant to avoid perilous position.

The court instructs the jury that although the cars attached to the train on which plaintiff was injured were so crowded on the morning of ———, ———, when plaintiff went to the train to ride to his employment that plaintiff could not get a seat therein, and by reason thereof plaintiff went to the pilot of the engine to ride up thereon, yet before the accident in which plaintiff was injured so many persons vacated the said cars that the plaintiff could have found a seat in said cars, and these facts were known to the plaintiff before the accident and when the train had come to a full stop so that plaintiff could have gone from the pilot to the cars, and the pilot was a dangerous or perilous place for plaintiff to occupy, then it was his duty to leave said pilot and go to said cars. *Downey v. Railway Co.*, 28 W. Va. 742.

c. Obviousness of danger—Preponderance of evidence.

The court instructs the jury that if at or before the accident in question, in which the plaintiff was injured, the appearance of the tender was such as to indicate danger to a person of ordinary prudence and that such

appearance was as obvious to the plaintiff as to the witness, —, then the jury should find for the defendant, unless they believe from the preponderance of the evidence, that the defendant was negligent in some other respect and that such negligence was the proximate cause of the injury. *Skidmore v. Railroad Co.*, 41 W. Va. 299.

d. Knowingly assuming place of danger — Failure to avert danger.

The court instructs the jury that if they believe from the evidence that the plaintiff knowingly and negligently assumed a place of danger, and negligently failed to do his duty in averting such danger, and his negligence was one of the proximate causes of the injury, then he is not entitled to recover damages from the defendant company on account of his injury. *Eastburn v. R. R. Co.*, 34 W. Va. 686.

e. Same.

The court instructs the jury that although they may believe from the evidence that ——— was not a capable man to run the mine machine referred to by the evidence in this case, and did not run such machine in a capable manner at the time of the injury to ———, yet, if they believe from the evidence that the said ——— had knowledge of the danger of said machine when in motion and could have avoided the injury to himself by the use of ordinary care upon his part, he, the said ———, would be guilty of contributory negligence and the jury should find for the defendant. *McVey v. St. Clair Co.*, 49 W. Va. 420.

f. Same — Continuing in service after knowledge of danger.

The court instructs the jury that if they believe from the evidence that the defendant was guilty of negligence

by allowing the tree with its projecting limb to remain in dangerous proximity to the roadway of the defendant, and that the deceased was injured by coming in contact with said limb on his passing train, yet the plaintiff is not entitled to recover in this action, if the jury further find from the evidence, that the deceased for some days before the accident had been fully apprised and made aware of the dangerous position and character of said limb, and the probable danger that might result to him in passing it on his train and spoke of such danger to others, the continuing of the deceased in such service, after such knowledge and anticipation of danger, constituting contributory negligence, and the jury must find for the defendant. *Woodell v. Improvement Co.*, 38 W. Va. 37.

g. Minority of servant—Capacity of to contribute to injury.

The court instructs the jury that in determining whether the plaintiff, a boy sixteen years of age, was guilty of contributory negligence, the jury have the right to take into consideration his age, capacity and experience, and although he may have been guilty of an act or acts which in an adult would have amounted to an assumption of the risk of injury and a waiver of the duty the master owes him, yet he cannot be held to have assumed any such risk or to have waived any such duty which one of his age, discretion and experience could not fully comprehend and appreciate. *Giebell v. Collins Co.*, 54 W. Va. 526.

h. Same—Knowledge and experience of minor servants.

The court instructs the jury that a boy seventeen years of age, with ordinary sense, can be held in law for contributory negligence and this rule applies to whatever may be the age of the youth, provided he has reached a

period of life when he is capable because of his knowledge and experience, to exercise ordinary care and caution in the performance of his duties as servant under his master. *McVey v. St. Clair Co.*, 49 W. Va. 423.

i. Right of master to prescribe rules for government of servants—Servant's knowledge of rules and continuance in service.

The court instructs the jury that the defendant company had a right to prescribe rules relating to section foremen, and the jury cannot consider or determine whether such rules are reasonable or not, Provided, the jury further believe from the evidence that the decedent had knowledge of such rules and continued in the service of the defendant with such knowledge. *Criswell v. Railroad Co.*, 30 W. Va. 809.

j. Agreement of servant to obey rules—Injuries resulting from violation of.

The court instructs the jury that if they believe from the evidence that the plaintiff in engaging in the service of the company, agreed that he would not attempt to get on or off the engines or trains in motion, and that he did not comply with that agreement, but in attempting to get on a moving train, in disobedience of the rules and his agreement, when he was not compelled by accident to get on, he stumbled over the wires complained of, but that he would not have been hurt had the engine been standing still, then such an attempt to get on a moving engine was negligence, and the plaintiff cannot recover. *Overby v. Railway Co.*, 37 W. Va. 534.

k. Same.

The court instructs the jury that if they believe from the evidence that the defendant had established a set of rules for the direction and regulation of its employes in

the conduct of its business, and that the plaintiff had agreed, when entering into the employment of the defendant, to obey the rules so made by the said defendant, and that said rules forbid and warn the employes not to jump on or off trains or engines in motion, and that the plaintiff, in violation of said rule or warning, undertook to jump on an engine while in motion, stumbled and fell, and had his hand mashed or cut off by the engine while in motion, and that he would not have had his hand mashed or cut off by falling or stumbling over the wires complained of if his said engine had not been in motion, then the violation of said rule or warning was such proximate, contributory negligence on his part as prevents him from recovering any damages in this case from the defendant, and you should find for the defendant. *Overby v. Railway Co.*, 37 W. Va. 535.

1. Servant's knowledge of rules—Injuries sustained by acting in violation of rules.

The court instructs the jury that the defendant was bound to take all reasonable precautions for the safety of the laborers employed by it on its track, including the plaintiff's decedent; yet the defendant had the right to make such rules and regulations for the conduct of its servants and agents, while engaged in its service, as in its judgment were reasonable and proper, or would conduce to the safety and comfort of its employes; and all servants, while engaged in such service with a knowledge of such rules and regulations, were bound to act in conformity therewith; and if the injuries were sustained by them while acting in violation thereof, no recovery can be had of the defendant therefor, if such violation was the cause of, or materially and directly contributed to such injury. *Criswell v. R. R. Co.*, 30 W. Va. 808.

m. Same.

The court instructs the jury that if by the rules and regulations of the defendant in force at the time of the injury complained of in this case, the engineers in charge of its engines were prohibiting from permitting plaintiff to ride on the pilot of its engines, or on its engines, and the plaintiff, at the time, had knowledge of the defendant's rules on that subject, then the mere knowledge or consent of the engineer in charge of the engine on which plaintiff was riding when injured, that plaintiff was riding on the pilot of said engine, does not entitle plaintiff to any greater rights against defendant in this case than he could have if defendant's engineer had been wholly ignorant of the fact that plaintiff was riding on the pilot of said engine. *Downey v. Railway Co.*, 28 W. Va. 739.

n. Same—Disobedience of rules.

The court instructs the jury that the defendant, the ——— railroad company, had a right to make a rule requiring their employes not to get on or off moving trains or engines, and if the jury find from the evidence that the plaintiff disobeyed such rule, and was injured while attempting to get on a moving engine, and that he was not compelled by sudden danger to jump on the engine, and would not have been hurt if the engine had been standing still, then the plaintiff cannot recover, and the jury is directed to find for the defendant. *Overby v. Railway Co.*, 37. W. Va. 535.

o. Same

The court instructs the jury that getting on a moving engine when such action was voluntary, and could have been avoided, is, of itself, negligence, and if the jury believe that the plaintiff in attempting to get on an en-

gine after night, while it was in motion, in violation of a rule of the company, fell and was hurt, but that he would not have been hurt had the engine been standing still, then they must find for the defendant. *Overby v. Railway Co.*, 37 W. Va. 535.

p. Concerning sufficient compliance with rules.

The court instructs the jury that if they believe from the evidence that the decedent, at the time of the accident, was standing either in the door of the front car as was moving, or looking through the glass in the door, and that he could see ahead of the train as well as if he had been on the outside, that would be a sufficient compliance with the rule requiring him to take a conspicuous place on the front of the car. *McCreery v. Railroad Co.*, 43 W. Va. 114.

q. Proximate cause of injury.

The court instructs the jury that if they believe from the evidence that there was a rule of the defendant prohibiting its employes from getting on and off moving trains, and that the plaintiff disobeyed that rule, that disobedience of the rule by the plaintiff will not of itself defeat the plaintiff's right to recover, unless it further appears from the evidence in this case that the disobedience of said rule was the proximate cause of the injury complained of. *Overby v. Railway Co.*, 37 W. Va. 534.

r. Burden of proof—Preponderance of evidence.

The court instructs the jury that where the defense is contributory negligence on the part of the plaintiff's decedent, the burden of proving contributory negligence is on the defendant, and to sustain it, it must have a preponderance of the evidence, that is from all the evidence in the case. *McCreery v. Railroad Co.*, 43 W. Va. 114.

s. When right to recover not affected by contributory negligence.

The court instructs the jury that the right of the plaintiff to recover in this action, if the jury believe from the evidence that he is entitled to recover, is not affected by his having contributed to the injury complained of, if the jury believe from the evidence that he did contribute to his own injury, unless he was in fault in so doing. *Giebell v. Collins Co.*, 54 W. Va. 525.

t. Same—Preponderance of evidence.

The court instructs the jury that even if they believe from the evidence that the defendant was guilty of negligence in allowing a ——— to remain in dangerous proximity to its road, and that the plaintiff was knocked off the engine by said ——— and injured, still the plaintiff is not entitled to recover in this action, if they believe from the evidence that he, by his negligence contributed directly, in any degree, to the injury complained of; but to bar the plaintiff from recovery, his alleged act of negligence must have been such as he could reasonably expect would result in his injury, and moreover, such negligence must be shown by a preponderance of all the evidence. *Riley v. Railroad Co.*, 27 W. Va. 154.

CHAPTER 50.

MESNE PROFITS.

**a. Allowance for permanent and valuable improvements
—Improvements when title deemed good.**

The court instructs the jury that they should not allow the defendant anything for improvements unless such improvements were permanent and valuable, and

further, also, that unless such improvements were made at a time when there was reason to believe the title good. *Botkin v. Arnold*, 48 W. Va. 111.

CHAPTER 51.

MUNICIPAL CORPORATIONS.

1. DEFECTIVE STREETS AND SIDEWALKS.
2. CHANGE OF GRADE OF STREETS.
3. SURFACE WATERS—DRAINS AND SEWERS.

1. DEFECTIVE STREETS AND SIDEWALKS.
 - a. Ownership of or control of streets.
 - b. Powers, duties and liabilities of municipal corporations.
 - c. Same.
 - d. Same—Contributory negligence.
 - e. Same—Contributory negligence—Burden of proof.
 - f. Care and caution required of municipal corporations.
 - g. Temporary obstructions to sidewalks while being graded.
 - h. Same—For grading and paving.
 - i. Improvements made by property owners by direction of city authorities.
 - j. Liability of property owners for injuries caused by excavations in public streets.
 - k. Same—When property owner prohibited from fencing off excavations.
 - l. Same—When excavation exists at time of purchase of property.
 - m. Condition of street or sidewalk at time of injury.

- n. Cause of injury—Remote cause of injury.
- o. What necessary for person injured to allege and prove.
- p. Previous knowledge of person injured of defects.

a. Ownership of or control over streets.

The court instructs the jury that the mere fact that the side-walk complained of was within the corporate limits of the defendant town is not sufficient to charge the town with the duty of keeping it in good repair and safe condition. To charge the defendant with that duty, it must be proved in the case that it is within the limits or lines of the public street or road in the town, made so by the council of the town, or that the authorities of the town have exercised control over it before the happening of the injury to the plaintiff. *Chapman v. Town of Milton*, 31 W. Va. 387.

b. Powers, duties and liabilities of municipal corporations.

The court instructs the jury that when a city is incorporated, and is given control over the streets and sidewalks within its corporate limits, and is empowered to provide the means to make and repair them, the corporation not only assumes this duty, but by implication agrees to perform it for the benefit and protection of all who may have occasion to use them, and that for failure in the discharge of this duty the municipal corporation is responsible to the party injured thereby. *Bowen v. City of Huntington*, 35 W. Va. 697.

c. Same.

The court instructs the jury that if they believe from the evidence that the defendant, at the time the accident occurred, was required by its charter to keep the sidewalks therein, at the place where the injury was sustained, in

good and sufficient repair; that the sidewalk on which the injury occurred was at the time within the corporate limits of the defendant; that the sidewalk at the place where the injury was sustained was out of repair as alleged in the declaration, and by reason thereof, the plaintiff was injured, then the plaintiff is entitled to recover. *Parrish v. City of Huntington*, 57 W. Va. 286.

d. Same—Contributory negligence.

The court instructs the jury that our statute imposes an absolute liability upon the defendant, the city of ———, for any injury sustained by the plaintiff by reason of the failure of the defendant to keep the sidewalk in the declaration mentioned in repair; provided, they are satisfied from the evidence in this case that the place of the alleged injury to the plaintiff was within the corporate limits of the defendant, and that such sidewalk was, at the time and place where the alleged injury occurred, controlled and treated by the defendant as a public sidewalk, and opened as such; and, provided further, that the plaintiff was not guilty of any negligence that contributed to such injury. *Phillips v. City of Huntington*, 35 W. Va. 408.

e. Same—Contributory negligence—Burden of proof.

The court instructs the jury that if they believe from the evidence that the sidewalk in the declaration mentioned was a public sidewalk within the corporate limits of the defendant, the city of ———, opened up, treated and controlled by the defendant as such sidewalk; and that the said sidewalk was out of repair, in a bad condition and unsafe for travel at the time of the plaintiff's alleged injury, and that by reason of the said sidewalk being so out of repair and in a bad and unsafe condition, the plaintiff was injured, then the plaintiff is entitled to a verdict in this case, unless the jury are satisfied that

the plaintiff was guilty of contributory negligence on his part, and that such negligence was the proximate cause but not the remote cause of his injury, and the jury is further instructed that the burden of proof of establishing such contributory negligence is upon the defendant. *Foley v. City of Huntington*, 51 W. Va. 398.

f. Care and precaution required of municipal corporation.

The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and maintain its streets, bridges and sidewalks in good and sufficient repair to render them reasonably safe for all persons in the exercise of ordinary care while passing on or over the same, and if the jury believe from the evidence that the defendant failed to use reasonable care and precaution to keep the sidewalk mentioned in the declaration in such repair and that the injury complained of resulted from that cause as charged in the declaration and that the plaintiff sustained damages thereby while exercising such degree of care and caution as under the circumstances might reasonably be expected of one of his age and intelligence, then he is entitled to recover of the defendant in this suit. *Parrish v. City of Huntington*, 57 W. Va. 286.

g. Temporary obstructions to sidewalks while being graded—Necessity for protection and warning against danger.

The court instructs the jury that while the defendant, for the purpose of grading the sidewalk in the declaration mentioned, might have temporarily obstructed the passage of travel over the same, it was not authorized to leave such street while undergoing such grading in such condition as unnecessarily to expose those who might pass upon it to danger, and that in such condition

such sidewalk should not have been left without protection or guard or beacon, especially at night, to warn travelers against such danger, and that if such reasonable precautionary measures were not adopted for the safety of the citizens and travelers the defendant was culpable and liable for injuries, if any, to the plaintiff, without any fault on his part, just as if the defendant had permitted one of its graded streets to become unsafe for want of repairs. *Bowen v. City of Huntington*, 35 W. Va. 697.

h. Same—Grading and paving—Requirements of corporation while improvements being made.

The court instructs the jury that while the defendant had the right to temporarily obstruct the passage of travel over the sidewalk where the plaintiff's injury is alleged to have occurred, for the purpose of grading and paving the said sidewalk, it was not authorized to leave said sidewalk, while undergoing such grading and paving, in such condition as unnecessarily to expose those who might pass upon it to danger, and that in such condition such sidewalk should not have been left without protection or guard or beacon, especially at night, to warn travelers without knowledge of its condition against such danger, and that, if such reasonable and precautionary measures were not adopted for the safety of such citizens and travelers, the defendant was culpable and liable for injuries, if any, to the plaintiff, if, without such knowledge and without any fault on her part she was injured thereby. *Snoddy v. City of Huntington*, 37 W. Va. 113.

i. Improvements made by property owner by direction of municipal authority — Negligence of property owner while improving sidewalks.

The court instructs the jury that the defendant has

the right to improve its sidewalks, which improvement may be made by the city itself or by the abutting lot-owner at the command of the city, and that during the progress of such improvement the absolute liability imposed on it by section 53 of chapter 43 of the Code is suspended; and they are instructed that if they find from the evidence in this case that the sidewalk on the ——— side of ——— street, between ——— and ——— streets, was being improved, at the time and place the injury complained of by an abutting lot-owner, at the command of the city, and that such injury was caused by the condition in which the work on such improvement had placed said sidewalk, then they must find for the defendant, unless they further find that the work of improvement was negligently conducted by the lot-owner, and that such injury was caused by the negligent condition in which such sidewalk was left by the lot-owner in such work of improvement, and without any fault on the part of the plaintiff. *Bowen v. City of Huntington*, 35 W. Va. 696.

j. Liability of property owner for injuries caused by an excavation in a public street.

The court instructs the jury that if they believe from the evidence that after the excavation of the cellar described in plaintiff's declaration, and before the injuries complained of therein, the corporation of the town of ———, by an ordinance duly passed, widened the public street in front of said cellar so as to embrace some six or seven feet of the front part of said cellar, to which widening the defendant consented or acquiesced, and if they further believe from the evidence that the plaintiff fell into that portion of said cellar, so embraced in the public street by the ordinance aforesaid, they must find for the defendant. *Beach v. Fankenberger*, 4 W. Va. 719.

k. Same—When property owner prohibited by municipal authority from fencing off excavations.

The court instructs the jury that if they believe from the evidence that the defendant was prohibited by an ordinance of the corporation of ———, in force before and at the time of the injuries complained of in plaintiff's declaration, from building a fence in front of the cellar described in plaintiff's declaration, and that the defendant assented to or acquiesced in said ordinance, and that the plaintiff fell into that portion of said cellar which the defendant was prohibited from fencing as aforesaid, they must find for the defendant. *Beach v. Frankenberg*, 4 W. Va. 719.

l. Same—When excavation exists at the time of purchase by property owner.

The court instructs the jury that if they believe from the evidence that the cellar or hole in which it is alleged the plaintiff fell and was injured, was made by the owner of the lot, ———, over which he built a ——— house which was burned, and thereby exposed the cellar or hole, in ——— 18—, and so continued so exposed till his death, when one of the heirs to whom it was allotted, in 18—, sold it to the defendant, in the same condition it was at the time the plaintiff was injured, then the plaintiff cannot recover in this case. *Beach v. Frankenberg*, 4 W. Va. 718.

**m. Condition of street and sidewalk at time of injury—
Condition before or after injury.**

The court instructs the jury that the question as to whether or not the street and sidewalk at the place mentioned and described in the declaration on this case was in a reasonably safe condition for the purpose of persons lawfully passing and re-passing over and along the same, both by day and night, must be determined

from the condition said sidewalk was in at the time the alleged injury complained of by the plaintiff was received by him, and not from its condition before or after that time. *Foley v. City of Huntington*, 51 W. Va. 400.

n. Proximate cause of injury—Remote cause of injury.

The court instructs the jury that if they believe from the evidence that the injury to the plaintiff was immediately caused by the negligence of the defendant in failing to keep the said road in repair, as charged in the declaration, and that the plaintiff was guilty of *some* negligence, which may have been the *remote* but not the *proximate* cause of the injury, they must find a verdict for the plaintiff. *Sheff v. City of Huntington*, 16 W. Va. 320.

o. What necessary for person injured to allege and prove.

The court instructs the jury that the plaintiff need only allege and prove the existence of the defect or want of repair in the sidewalk in the declaration mentioned, and that he was injured thereby without any fault of his own, and that the sidewalk at the place where plaintiff's injury is alleged to have occurred was under the control of the defendant within its corporate limits, and was by the defendant treated and assumed to be kept in repair as a public sidewalk. *Bowen v. City of Huntington*, 35 W. Va. 697.

p. Previous knowledge of person injured of defects in public highway—Want of ordinary care.

The court instructs the jury that previous knowledge of a defect in or of the dangerous condition of a street, road or highway by reason of such defect or dangerous condition is evidence tending to show that such person was not using ordinary care, and is to be considered with the other evidence in the case in determining

whether the plaintiff was in the exercise of ordinary care at the time of the accident. *Wilson v. City of Wheeling*, 19 W. Va. 329.

2. CHANGING GRADE OF STREETS.

- a. Injury to property without owner's consent.
- b. Authority for establishing grade of streets.
- c. Establishment of grade prior to purchase of property.
- d. Building below established grade.
- e. Raising property to established grade.
- f. Market value of property.
- g. Same.
- h. When not part of property taken—Value of property before and after improvements made.
- i. Enhancement in value of property by grading and paving.
- j. Same—Off-set of damages by accrued benefits.

a. Liability for injury to property without owner's consent.

The court instructs the jury that if they believe from the evidence that the city of ——— has injured the property of the plaintiff, without her consent having been first obtained, that it is your duty to ascertain and determine the extent of said injury and by your verdict compensate her for the said injury. *Blair v. City of Charleston*, 43 W. Va. 73.

b. Municipal authority for establishing grade of streets.

The court instructs the jury that if they believe from the evidence that the city of ——— is granted by the Legislature of West Virginia power to control the grades of streets and the building of houses within its corporate limits, and under such authority established a grade

for ——— street by ordinance duly enacted and recorded and subsequently granted to plaintiff a permit to build on said street, and plaintiff subsequently built on said street below such established grade line, then the plaintiff can not recover for damages to such house against the defendant by reason of the filling and paving of said street to such grade theretofore established. *Blair v. City of Charleston*, 43 W. Va. 73.

c. Establishment of grade line for street prior to purchase of property by person alleging injury—Owner's constructive knowledge of established grade.

The court instructs the jury that if they believe from the evidence that prior to the plaintiff's ownership of the property on ——— street, the city of ———, had by properly enacted ordinance adopted a grade line for said street and that plaintiff had constructive knowledge of this fact, both at the time of her purchase of said property and at the time of the construction of her houses thereon, and the said city afterwards filled said street and paved same to a grade no higher than the grade theretofore established, then the plaintiff can not recover for damages alleged to be suffered by reason of said fill and paving of said street. *Blair v. City of Charleston*, 43 W. Va. 73.

d. Same—Effect of building below established grade.

The court instructs the jury that if they believe from the evidence that the city of ——— had established a grade line for ——— street and that subsequent to said establishment, the plaintiff acquired lots abutting on said street and voluntarily built houses below the plane of said grade line, and the said city afterwards filled said street to said grade and paved same, then the plaintiff can not recover for damage to said buildings result-

ing from said fill and paving. *Blair v. City of Charleston*, 43 W. Va. 73.

e. Effect of raising building to grade lower than established grade.

The court instructs the jury that if they believe from the evidence that the plaintiff voluntarily raised her dwelling house without ascertaining the established grade of ——— street, to a grade lower than is necessary to render the house convenient for ingress and egress, and thereby occasioned the necessity for additional and unnecessary expense in raising said dwelling house to a proper grade, then such expense caused by such mistake in the raising of said dwelling house can not be taken into consideration by the jury in arriving at their verdict. *Blair v. City of Charleston*, 43 W. Va. 73.

f. Decrease of market value of property caused by grading and paving of street.

The court instructs the jury that if they believe from the evidence that the fair market value of plaintiff's property was not decreased by the paving of ——— street by the city of ——— complained of in the declaration, then they shall find for the defendant. *Blair v. City of Charleston*, 43 W. Va. 73.

g. Same.

The court instructs the jury that any recovery of damages against a municipal corporation must be based upon pecuniary loss to the person damaged, and unless they believe from the evidence that the fair market value of plaintiff's property was decreased by the filling and paving of ——— street, then they must find for the defendant. *Blair v. City of Charleston*, 43 W. Va. 73.

h. Same—When no part of property taken—Value of property before and after improvements made.

The court instructs the jury that when an action is brought to recover damages where no part of the plaintiff's property has been taken, but simply damaged by a public improvement, damages can not be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement.

In other words, if the fair market value of the property was as much after the construction of the improvement as it was immediately before the improvement was made, no damage can be sustained, and no recovery can be had.

Therefore, in this case, if the jury believe from the evidence that the fair market value of the plaintiff's property was as much immediately after the filling and paving of ——— street as it was immediately before, without taking into consideration any improvement plaintiff made while said street improvement was in progress then she has sustained no damages which can be the subject of a recovery in this suit, and they shall find for the defendant. *Blair v. City of Charleston*, 43 W. Va. 73.

i. Enhancement in value of property by grading and paving.

The court instructs the jury that in no view of the case can they award to the plaintiff damages to a greater sum than is sufficient to reimburse her for the decrease, if any, in the market value of her property caused by the filling and paving of ——— street; and if the jury believe from the evidence that the changes in the property claimed by the plaintiff to be necessary to be made and for which she seeks to recover in this action will have the effect to enhance the value of said property beyond what it would have been in case said improvement of the

street had not been made, then they can not allow in their verdict any sum for changes which would so enhance said value. *Blair v. City of Charleston*, 43 W. Va. 73.

j. Same—Off-set of damages by accrued benefits.

The court instructs the jury that if they believe from the evidence that benefits have accrued to the plaintiff's property by reason of the filling and paving of ——— street which counterbalance any damage which may have been done her property by reason of such filling and grading then they should find for the defendant. *Blair v. City of Charleston*, 43 W. Va. 73.

3. SURFACE WATERS—DRAINS OR SEWERAGE.

- a. Liability of casting surface water upon an individual.
- b. Drains or sewerage for carrying away water from cellars.
- c. Same—Raising grade of streets.
- d. Same—Injuries resulting from other causes.

a. Liability of a municipal corporation for casting surface water upon the property of an individual.

The court instructs the jury that in disposing of surface water, a municipal corporation has no right, by any means whatever, to collect and cast the same upon the property of an individual. *Clay v. City of St. Albans*, 43 W. Va. 546.

b. Drains or sewerage for carrying away water from cellars.

The court instructs the jury that the law does not require the city of ——— to furnish a drain or sewer to

carry away water from the cellar on the premises in the plaintiff's declaration described, or away from said premises. *Jordan v. City of Benwood*, 42 W. Va. 322.

c. Same—Raising grade of street.

The court instructs the jury that the fact that the city of ——— raised the grade of ——— street and of alley ———, so as to prevent water flowing from the cellar on the premises in the plaintiff's declaration described, or away from said premises, upon said street or said alley, will not, of itself, entitle the plaintiff to recover damages in this action. *Jordan v. City of Benwood*, 42 W. Va. 322.

d. Same—Injuries resulting from other causes.

The court instructs the jury that if they believe from the evidence that the city of ———, since ———, ———, and before the bringing of this suit, has damaged the premises described in the plaintiff's declaration otherwise than by preventing the water from flowing therefrom upon ——— street or upon alley ———, their verdict must be for the defendant. *Jordan v. City of Benwood*, 42 W. Va. 322.

CHAPTER 52.**NATURAL GAS.**

- a. Gas furnished for domestic purposes—Dangerous substances—Care and skill required in its operations.
 - b. Same.
 - c. Same—Amount of pressure—Requirements as to.
 - d. Same.
 - e. Defective fittings and appliances put in by consumer—Increased pressure—Leakage or escape of gas—Explosions.
 - f. Same.
 - g. Same.
 - h. Same—Obligation of consumer to keep fixtures and appliances in proper condition.
 - i. Inferences as to increased pressure.
 - j. Contributory negligence.
 - k. Same—Burden of proof.
 - l. Same—Mutual negligence—Burden of proof.
- a. Gas furnished for domestic purposes—Dangerous substance—Care and skill required in its operations.

The court instructs the jury that a corporation or person furnishing natural gas to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, to be used for the purpose of domestic heat and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty and dangerousness of the nature of its business, in order that injury may not be occasioned to others; that is to say, if the danger, delicacy, and difficulty is extraordinarily great, extraordinary skill and diligence is required. *Barrickman v. Oil Co.*, 45 W. Va. 643.

b. Same.

The court instructs the jury that it was the duty of the defendant, as it is of all incorporated companies which are invested for their own profit and advantage with the great and important privilege of supplying a community with natural gas for private habitation, to be used as fuel and domestic heating, to exercise such care, diligence and skill in the conduct of its business as is proportioned to the danger or risk to the property of others. *Barrickman v. Oil Co.*, 45 W. Va. 644.

c. Same—Requirements as to amount of pressure.

The court instructs the jury that if they believe from the evidence that natural gas is a very dangerous, volatile, and explosive substance, then the person or corporation which furnishes it for valuable consideration to the stoves, heaters, burners, pipes, lines of pipe, machinery or apparatus of another, for the purpose of fuel for domestic heat; must use such care, skill, attention and diligence in order that no greater amount of pressure thereof shall be so furnished than is proper to be furnished, and in order to prevent injury to the person or property of others, as is proportioned to the danger of such substances. *Barrickman v. Oil Co.*, 45 W. Va. 644.

d. Same—Machinery, appliances and work required.

The court instructs the jury that if they believe from the evidence that natural gas is an extremely dangerous substance, and that the defendant, at the time of the burning alleged in the declaration, was furnishing, for a valuable consideration, such gas to the heaters, burners, stoves, grates, pipes, lines of pipe, machinery or apparatus of the plaintiff, for the purpose of using such gas as fuel for domestic heat in and about the dwelling house mentioned in the declaration at the time of such burn-

ing, then it was the duty of the defendant, under the law to use such care, diligence and skill, both in providing proper machinery, regulators and apparatus, work, labor, and attention, in order to control such gas, and the amount of pressure furnished to such dwelling house, as is in due proportion to the nature of the substance used. *Barrickman v. Oil Co.*, 45 W. Va. 644.

e. Defective fittings and appliances furnished and put in by consumer—Leakage or escape of gas—Increased pressure—Destruction of property resulting from gas explosion.

The court instructs the jury that if they believe from the evidence that the house of the plaintiff, described in the declaration, was by the defendant furnished and supplied with gas on the application of the plaintiff's tenant, and that such gas was conducted from the defendant's main or gas line to said house by means of pipe, valves, fittings and appliances laid and furnished by said tenant, with the consent of the plaintiff, and that pursuant to a promise made by said tenant that he, said tenant, would keep and maintain said pipe, valves, fittings and appliances necessary and proper for the safe use and consumption of said gas in good order and repair, and that the fire which consumed the plaintiff's house was caused by an explosion of the gas in said house; or by any other means resulting from the escape or leakage of said gas, or the negligent manner of taking care of or using the same after leaving the defendant's main, the plaintiff cannot recover, and the jury should find for the defendant. *Barrickman v. Oil Co.*, 45 W. Va. 650.

f. Same.

The court instructs the jury that if they believe from

the evidence that the plaintiff's tenant was guilty of negligence in the placing or maintaining on said leased premises the pipes, valves, fittings and appliances which made the connection to conduct said gas from defendant's main into the house on said leased premises in an unsafe condition, and in not keeping and maintaining said pipe, valves, fittings and appliances in good order and repair, and in proper and safe condition for the use and consumption of the gas, and that by reason of which unsafe condition of said pipe, valves, fittings and appliances said house was set on fire and destroyed, by means of an explosion of said gas, or by means of an increased heat or the escape of gas, occasioned in whole or in part, by such unsafe defective pipes, valves, fittings and appliances, the negligence of the tenant should prevent the plaintiff from recovering in this action, and the jury should find for the defendant. *Barrickman v. Oil Co.*, 45 W. Va. 649.

g. Same.

The court instructs the jury that if they believe from the evidence that at the time of the fire which destroyed plaintiff's house there was an unusual pressure of gas, as described in the declaration, and that said gas, with unusual force, came into the pipe and appliances and to the burners, valves and fittings on the plaintiff's premises, and thus increased the quantity of gas where the same was to be consumed, yet the plaintiff cannot recover if the jury further believe from the evidence that the pipe, valves, fittings and appliances placed on the plaintiff's premises for the purpose of conducting said gas from the defendant's line to said house were not in good order and repair, and were at the time of the fire unsafe for the use and consumption of said gas, and that by reason thereof, the said gas escaped, or the quantity thereof being burned was increased, and caused the destruc-

tion of said house. *Barrickman v. Oil Co.*, 45 W. Va. 649.

h. Same—Obligation of consumer to keep fixtures and appliances in proper condition.

The court instructs the jury that if they believe from the evidence that the house of the plaintiff described in the declaration was by the defendant furnished and supplied with gas upon the application of the plaintiff's tenant, and that such gas was conducted from the defendant's main or gas line to the said house by means of pipe, valves fittings and appliances laid and furnished by the said tenant with the consent of the plaintiff, and that such gas was furnished upon the promise of the said tenant that he would keep and maintain said pipe, valves, fittings and appliances in good order and repair, the jury is instructed that it was the duty of the plaintiff, or his tenant, to see that the pipe, valves, fittings and appliances and fixtures on the premises of the plaintiff described in the declaration, and which conducted the gas from the defendant's gas line to the premises of the plaintiff, were kept in good order and repair, and in proper and safe condition for the use and consumption of gas on the premises and in the house of the plaintiff; and if the jury believe from the evidence that such pipes, valves, fittings and appliances which made the connections necessary to conduct said gas from the defendant's gas line to said premises were not, at the time of the burning of the plaintiff's house, in good order and repair and safe condition for the consumption of gas, and that the fire which destroyed the plaintiff's house was caused from gas, and that such fire was caused by escape or leakage of such gas, or the negligent manner of taking care of or using the same after leaving the defendant's main or gas line, the plaintiff can not recover, even if the defend-

ant was negligent as claimed by the plaintiff in his declaration. *Barrickman v. Oil Co.*, 45 W. Va. 653.

i. Inferences as to increased pressure.

The court instructs the jury that the mere fact that the house of the plaintiff was set on fire is not sufficient to justify the inference that an increased pressure of gas caused the fire. *Barrickman v. Oil Co.*, 45 W. Va. 648.

j. Contributory negligence.

The court instructs the jury that if they believe from the evidence that at the time of the fire which destroyed plaintiff's house, the plaintiff's tenant was guilty of negligence in not keeping and maintaining pipes, valves, fixtures and appliances placed on the premises of the said plaintiff for the purpose of conducting the said gas from the defendant's main into said dwelling house on said premises in good order and repair, and if the said negligence of the said tenant, in whole or in part, caused or occasioned the injury complained of and described in the declaration in this cause, the plaintiff can not recover, and the jury should find for the defendant. *Barrickman v. Oil Co.*, 45 W. Va. 649.

k. Same—Burden of proof.

The court instructs the jury that the burden of proving contributory negligence rests with the defendant, but the jury may look to all the evidence offered by both parties to determine the question of contributory negligence. *Barrickman v. Oil Co.*, 45 W. Va. 646.

l. Same—Mutual negligence—Burden of proof.

The court instructs the jury that in this case negligence is the ground of the plaintiff's action, and that it therefore rests upon the plaintiff to trace the fault of his injury to the defendant, by proving negligence upon

the part of the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if from these circumstances so proven by the plaintiff, and from all the evidence, including the evidence of the defendant, it appears that the fault of the injury was mutual, or in other words, that the negligence is fairly imputable to the plaintiff or his tenant, the plaintiff cannot recover. *Barrickman v. Oil Co.*, 45 W. Va. 651.

CHAPTER 53.

NEGOTIABLE INSTRUMENTS.

- a. Joint promissors—When party liable as.
- b. Same—Right to recover proportionate part of amount paid.
- c. Whether liability that of indorser or joint maker.
- d. Same—Burden of proof.
- e. Same—As to indorser.

a. Joint promissor—When party liable as.

The court instructs the jury that when —— put his name on the back of the note sued on in this case he thereby intended to become bound for its payment in some form; and if the jury believe from the evidence that said note was delivered to the plaintiff before maturity, in its present form, in the absence of proof of an understanding, known to the plaintiff or his agent, that said —— was to be bound in any particular manner, then the plaintiff has the right to charge him as joint promisor or maker along with the other parties whose names appear upon the said note, and they must find for the plaintiff. *Grocery Co. v. Watkins*, 41 W. Va. 792.

b. Right of one joint promissor to recover from another proportionate part of amount paid on joint note.

The court instructs the jury that if they believe from the evidence that the plaintiff, ——— and defendant, ———, jointly and severally agreed to pay to the ——— bank the remaining balance of the original ——— debt, and that the same was afterwards paid by plaintiff, then plaintiff has the right to recover from the defendant one-half of such amount paid by him by reason of such joint and several obligation. *Bartlett v. Armstrong*, 57 W. Va. ———.

**c. Whether liability that of indorser or joint maker—
Consideration of contents of notice of protest.**

The court instructs the jury that if they believe from the evidence that the defendant indorsed his name on the back of the note sued on as indorser, and not as joint maker thereof, and that at the time said note was delivered to the plaintiff he knew the said defendant indorsed the said note as an indorser thereon, and not as a joint promisor, and that the said plaintiff had said note regularly protested, and had notice sent to the defendant, as indorser of such protest, then the jury may consider said facts along with the other evidence in the case, and if they believe from the evidence that the said defendant was an indorser on the note sued on, and not a joint maker or promisor, they should find for the defendant. *Grocery Co. v. Watkins*, 41 W. Va. 793.

d. Same—Burden of proof.

The court instructs the jury that the burden of proof is upon the defendant to prove that when he put his name on the back of the note in suit, before its delivery to the plaintiff, he intended to become bound only as guarantor or indorser or otherwise than as joint

promisor or maker along with the other parties to said note, and that he must show that such understanding was had with the plaintiff. *Grocery Co. v. Watkins*, 41 W. Va. 792.

e. Notice of protest not necessary to be given to a joint promissor.

The court instructs the jury that if they believe from the evidence that the defendant is bound as joint promisor or maker of the note sued upon, then no notice of protest was necessary to be given to the defendant. *Grocery Co. v. Watkins*, 41 W. Va. 792.

CHAPTER 54.

NUISANCE.

a. House kept for entertaining prostitutes—Improprieties permitted in house—When liquor license fails to excuse keeper of disorderly house.

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant kept a room in her hotel near the bar, for the purpose and with the intent of bringing together and entertaining prostitutes and men desirous of their company, and that such persons were in the habit of assembling there to drink and play cards together, then the jury should find the defendant guilty, even though they may believe that the house was kept quietly and no conspicuous improprieties were permitted inside. And the fact that she had a hotel or liquor license cannot excuse the defendant, provided the jury find the house disorderly. *State v. McGahan*, 48 W. Va. 442.

CHAPTER 55.**OIL AND GAS LEASES.**

- a. **Machinery and fixtures—Reasonable time given lessee to remove same from leased premises.**

The court instructs the jury that the plaintiff's were not deprived of the right to remove the property demanded in the declaration, under the evidence offered to the jury, if, from such evidence, the jury shall believe such property was placed upon the leased premises for the purpose of drilling or operating for oil and gas, by reason of the fact that a decree was entered by the circuit court of _____ county, on or about the _____ day of _____, _____, in an equity suit brought by the defendant against the plaintiff for such purpose, and that the plaintiff would be entitled to a reasonable time after the termination of the suit in equity to remove said property from the leased premises. *Gartland v. Hickman*, 56 W. Va. 82.

CHAPTER 56.**OIL WELLS.**

- a. Abandonment of work on wells.
b. Same—Agency—Acts, declarations and conduct of.
- a. **Abandonment of work on wells—Hired tools—Duty of party renting to return to owner.**

The court instructs the jury that if they believe from the evidence that the defendant had hired the plaintiff's tools and had quit work on the well in question,

and had not purchased said tools, it was the duty of the defendant to immediately return the tools to the plaintiff, and so notify the plaintiff, and in case he failed to do so, then, in that event the jury should find for the plaintiff. *Coulter v. Blatchley*, 51 W. Va. 165.

b. Same—Agency—Acts, declarations and conduct of agent.

The court instructs the jury that if they believe from the evidence that —— was the agent of the defendant in charge at the well in controversy, and that said agent had placed —— in charge of said well temporarily in his absence, and never returned to assume the management of said well, and never discharged —— from the managing and looking after said well, and that said —— was never discharged by the defendant from said management, and that the defendant ratified the act of the said agent, then, in that event, the acts, declarations and conduct of said —— in managing and controlling said well would bind the defendant, and the jury should find for the plaintiff. *Coulter v. Blatchley*, 51 W. Va. 166.

CHAPTER 57.

PARENT AND CHILD.

1. SALE OF INTOXICATING LIQUORS TO MINORS.
2. SEDUCTION OF MINORS.

1. SALE OF INTOXICATING LIQUORS TO MINORS.

- a. Right of action by mother of minor son.
- b. Loss of means of support.
- c. Unlawful sales—Liquor dealer's knowledge of.
- d. Exemplary damages.
- e. Allegations and proof.

a. Right of action against liquor dealer by mother of minor son.

The court instructs the jury that if the mother of a minor son has been injured in her means of support by the intoxication of such son, caused in whole or in part by intoxicating liquors unlawfully sold to him by a liquor dealer, the mother has a right of action against the person making such sale, although at the time of such injury she may be living with a husband, on whom she depends in part for her support. *McMaster v. Dyer*, 44 W. Va. 645.

b. Same—Loss of means of support.

The court instructs the jury that if they believe from the preponderance of the evidence that the defendant has injured the plaintiff, in person or in means of support, in manner and form as alleged in the declaration, by unlawfully selling to her minor son, ————, intoxicating liquors, as alleged, and that his intoxication was caused, in whole or in part, by intoxicating liquors

unlawfully sold to him by the defendant, as in the declaration alleged, and that such injury was the result of such intoxication, the jury should find for the plaintiff. *McMaster v. Dyer*, 44 W. Va. 646.

c. Concerning liquor dealer's knowledge of unlawful sales.

The court instructs the jury that a sale of intoxicating liquors by a liquor dealer to a minor is unlawful, if at the time of such sale the liquor dealer knows, or has reason to believe that the purchaser is a minor. *McMaster v. Dyer*, 44 W. Va. 646.

d. Exemplary damages—Definition of.

The court instructs the jury that if they believe from the preponderance of the evidence that the plaintiff is the mother of ————, that he is a minor, and that the defendant, by himself or by his clerk, or any one acting under his authority, unlawfully sold to the said ———— on the ———— day of ————, 18—, at the defendant's place of business, at ————, in this county, intoxicating liquors, and that the said intoxicating liquors, in whole or in part, caused the intoxication of the said ————, and that by reason of such intoxication the plaintiff was injured, in person or in means of support, in manner and form as in the declaration alleged, then the jury should find for the plaintiff, and assess in her favor such damages as the jury should find from the evidence she has sustained by reason of such intoxication, and also exemplary damages, but not exceeding altogether ———— dollars. By 'exemplary damages' is meant such damages as should be inflicted upon a wrongdoer as a warning to him and others to prevent a repetition or commission of similar wrongs. *McMaster v. Dyer*, 44 W. Va. 646.

e. Allegations and proof.

The court instructs the jury that if they believe from a preponderance of the evidence that the allegations of the plaintiff's declaration have been substantially proved, then the jury should find for the plaintiff. *McMaster v. Dyer*, 44 W. Va. 646.

2. SEDUCTION OF MINOR.

a. Loss of services — Relinquishment of control of minor.

b. Exemplary damages.

a. Loss of services of minor by parent — Concerning parent's relinquishment of control of minor.

The court instructs the jury that if they believe from the evidence that the daughter of the plaintiff was seduced by defendant whilst at the defendant's house and in his employ, and that she was under the age of twenty-one years, then unless the evidence in this case should satisfy you that the plaintiff had relinquished all control over the daughter and all right to her services, the law presumes that the plaintiff is entitled to her services, and any loss of services sustained by the plaintiff occasioned by such acts of seduction does entitle the plaintiff to recover. *Riddle v. McGinnis*, 22 W. Va. 262.

b. Same—Exemplary damages.

The court instructs the jury that if they believe from the evidence that the plaintiff did sustain loss of services of his daughter, and that such loss of services was occasioned by the seduction and wrongful act of the defendant, then you may take into consideration the shame, loss of respect and mortified feeling of the plaintiff, and give such exemplary damages as you may believe the plaintiff entitled to. *Riddle v. McGinnis*, 22 W. Va. 262.

CHAPTER 58.

PHYSICIANS AND SURGEONS.

a. Degree of care and skill required—Special agreements.

b. Dismissal of physician from control of case.

a. **Degree of care and skill required—Special agreement—Inference as to negligence.**

The court instructs the jury that it is claimed by the plaintiff that the defendant was employed to treat professionally, as a surgeon, his injured ———. By the defendant accepting the employment he bound himself to use in his treatment of the ——— a reasonable, ordinary degree of care and skill of the profession in his community, but he did not undertake to use the highest degree of care and skill, nor, in the absence of a special agreement, did he undertake to perform a cure.

Nor can you infer that the defendant was negligent simply because a cure was not effected. The burden of proving his case rests upon the plaintiff. *Lawson v. Conaway*, 37 W. Va. 163.

b. **Dismissal of physician from control of case—Care and skill exercised prior to dismissal.**

The court instructs the jury that if they believe from the evidence that the plaintiff, on the ——— day of ———, 18—, discharged the plaintiff from the management and treatment of his ———, and if you further find from the evidence that prior to the said date of dismissal of defendant by the plaintiff, the defendant exercised the ordinary care, skill and diligence of his profession in his community in the management and treat-

ment of the ———, then you must return a verdict for the defendant. *Lawson v. Conway*, 37 W. Va. 164.

CHAPTER 59.

RAILROADS AND RAILROAD COMPANIES.

- I. INJURIES TO PERSONS ON OR NEAR TRACK.
 - II. EJECTMENT OF PERSONS FROM FREIGHT TRAINS.
 - III. INJURIES TO ANIMALS.
 - IV. CAUSING LOSS OF PERSONAL PROPERTY.
 - V. INJURIES TO REAL ESTATE.
 - VI. INJURIES TO WATER MILLS.
 - VII. CONSTRUCTION OF CROSSINGS AND CATTLE GUARDS.
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- I. INJURIES TO PERSONS ON OR NEAR TRACK.
 - a. Injuries caused by failure to give sufficient warning to avoid danger.
 - b. Use of track as footpath—Duty of person so using to exercise care and precaution.
 - c. Same—Risks assumed by persons using track as a footpath.
 - d. Same—Requirements to look for approaching trains—Contributory negligence.
 - e. Same.
 - f. Warning signals—Statutory requirements as to.
 - g. Same—Failure to give warning signals.
 - h. Injuries to persons while trespassing on track—Duty of engineer and fireman to keep constant lookout for children.
 - i. Same.
 - j. Same—As to contributory negligence.
 - k. Same—As to contributory negligence.

- l. Assessment of damages.
 - m. Gross negligence—Contributory negligence.
 - n. Same.
 - o. Concerning duty of persons to stop, look and listen
—Presumption as to.
- a. Injuries caused by failure to give sufficient warning to avoid danger—Necessity for establishing negligence.

The court instructs the jury that to enable the plaintiff to recover the jury must find from the evidence that the defendant negligently, with force and violence, drove its locomotive engine without ringing its bell or blowing its steam whistle for a sufficient time to give due notice to the said plaintiff of the approach of the said locomotive upon and against the said plaintiffs and the horse and wagon which the said plaintiff was then and there driving along said public road, and over the said public railroad crossing, and that by means of such engine being so negligently driven, as aforesaid, against and upon the plaintiff and his horse and wagon, the said horse was and became greatly frightened and ran away with and overturned plaintiff's wagon, throwing him out and injuring him. *Beyel v. Railroad Co.*, 34 W. Va. 545.

- b. Use of track as a footpath—Duty of person so using to exercise care and precaution.

The court instructs the jury that every person of ordinary intelligence is bound to know that a railroad yard, with its numerous switches, tracks, and appliances where engines, cars and trains are frequently passing and repassing, is a place of more than ordinary danger, and it becomes his legal duty, if he goes on such yard, to use corresponding care and caution to avoid injury; and even though the defendant company, in this cause, may have permitted persons to pass along and over its tracks in said yard, still, if the jury believe from the evidence

that deceased was walking along on the track in the yard and using the same as a footpath on going from one part of the town to another, it was negligence on his part to employ such track in said yard for such purpose without exercising the greatest care and caution to discover the approach of trains and avoid being struck by them. *Spicer v. Railway Co.*, 34 W. Va. 520.

c. Same—Risks assumed by persons using track as a footpath.

The court instructs the jury that persons who live in the vicinity of a railroad and use the tracks or spaces between the tracks as a footpath, although used by the public generally, without objection on the part of the railroad company, go there at their own risk and enjoy the license subject to the perils. *Spicer v. Railway Co.*, 34 W. Va. 520.

d. Same—Requirements to look for approaching trains—Contributory negligence.

The court instructs the jury that it is the duty of a person either about to cross or walk along a railroad to look in every direction from which a train may approach before going upon a railroad, and if he fail to look, when he could have seen the approaching train if he had looked, it is such proximate contributory negligence as will prevent him from recovering any damages for injuries sustained by being struck by a train immediately after going upon the track, unless the servants of the railroad could have seen or discovered him in time to avoid his negligence in getting upon the railway track. *Spicer v. Railway Co.*, 34 W. Va. 520.

e. Same.

The court instructs the jury that if they believe from

the evidence that the plaintiff's intestate was walking along the railroad tracks of the defendant company within what is known as the "—— railroad yard" used by the defendant for the purpose of switching and making up trains; and that there were several tracks and numerous switches therein, and trains almost constantly passing and re-passing over and along the said tracks at all hours of the day and night; and while he was so walking along the said tracks in the said yard, in order to avoid one train coming towards him along one of the tracks, he stepped over onto another track, directly in front of a train going east, without looking back to see if there was such a train on such track; and that, if he had so looked back, he could have seen the train that struck him before he stepped onto such track, and have avoided being struck by it, then such failure to so look back was negligence on the part of said decedent; and, unless the jury, find from the evidence that the said decedent was seen, or could have been seen, by the trainmen in charge of the train that struck him for a sufficient length of time after he stepped on the track in front of the train, before he was struck, to have enabled them to stop the train, before he was struck, or give decedent sufficient warning to get off the track, then they must find for the defendant. *Spicer v. Railway Co.*, 34 W. Va. 521.

f. Warning signals—Statutory requirements as to.

The court instructs the jury that the statute of West Virginia does not require both the sounding of the whistle and the ringing of the bell on an engine or train approaching a public street or crossing; either the sounding of the whistle or the ringing of the bell for a time sufficient to give notice of the approach of such train before such street or crossing is reached, is sufficient. *Spicer v. Railway Co.*, 34 W. Va. 520.

g. Same—Failure to give warning signals.

The court instructs the jury that if they find from the evidence that decedent was injured while walking upon the track of defendant's railway not in a public road or crossing of a public road, the fact that no signals were given by the servants in charge of the defendant's train for the crossing of ——— street would not be such neglect as would render the company liable for the injury to the decedent, unless the servant in charge of defendant's train knew, at the time the train was being backed, or could have known, by the exercise of care, caution and prudence, that decedent was on the track, and then failed to give any signals or warning to him of the approach of the train. *Spicer v. Railway Co.*, 34 W. Va. 521.

h. Injuries to persons while trespassing on track—Duty of engineer and fireman to keep constant lookout for children.

The court instructs the jury that according to the law of West Virginia it is the duty of the engineer and fireman on an engine to keep a constant lookout ahead for children that may be trespassing on the railroad track, so as to avoid injury to them, if possible; and if they neglect to do so the railroad company employing them is liable for any injury caused by their negligence. *Davidson v. Railway Co.*, 41 W. Va., 411.

i. Same.

The court instructs the jury that even if the plaintiff's decedent was in the position of a trespasser on the defendant's property, yet it was the duty of the defendant to exercise ordinary care to avoid injury to him; therefore if the jury believe from all the evidence that decedent could have been seen by the engineer or fireman on the engine mentioned in the evidence by the exercise of ordinary care in time to stop the engine and avert the acci-

dent, it was their duty to do so, and if they neglected to keep a constant lookout ahead, and thereby failed to see him in time to stop, the defendant railway company is liable, and the jury should find for the plaintiff. *Davidson v. Railway Co.*, 41 W. Va. 411.

j. Same.

The court instructs the jury that even if the plaintiff's decedent was in the position of a trespasser on the defendant's property, it was the defendant's duty to exercise ordinary care to avoid injury to him. Therefore, if the jury believe from all the evidence in this case that the engineer or fireman on the engine mentioned in the evidence did see the hand car mentioned in evidence, on which the said decedent was riding, in time to stop the engine and avert the accident, it was their duty to stop the engine as soon as possible, and if they could have stopped it in time to avoid the injury to him by the exercise of ordinary care, and neglected to do so, the defendant is liable and the jury should find for the plaintiff. *Davidson v. Railway Co.*, 41 W. Va. 411.

k. Same—As to contributory negligence.

The court instructs the jury that if they believe from the evidence in this case that the plaintiff permitted his decedent, a boy of nine years of age, to go from his home at ———, after or to get ———, but did not know that he was going to ride on a hand car, he, the plaintiff, is not by reason of such permission, guilty of contributory negligence, and the defendant cannot be relieved from liability solely because the plaintiff thus permitted his said son to go from home. *Davidson v. Railway Co.*, 41 W. Va. 411.

l. Assessment of damages.

The court instructs the jury that if they find for the plaintiff, they will assess his damages at such sum as they

may deem just and right so as not to exceed the sum of \$——. *Davidson v. Railway Co.*, 41 W. Va. 412.

m. Gross negligence—Contributory negligence.

The court instructs the jury that they are entitled to consider all the facts and circumstances proven, for the purpose of determining whether the defendant was guilty of negligence. If they believe that —— was killed by a train operated by the defendant on the —— day of ——, 19——, at ——, and should they find that defendant was guilty of gross negligence, under the circumstances, they should find for the plaintiff, unless said —— was guilty of negligence which directly contributed to his death. *McVey v. Railway Co.*, 46 W. Va. 120.

n. Same.

The court instructs the jury that if they believe from the evidence that defendant's train killed —— on the night of ——, ——, at ——, and that such train was not, under the circumstances shown in evidence, run with reasonable care to prevent accidents, this will render defendant liable for his death, unless it was shown either by the evidence of plaintiff that said —— was guilty of negligence which was in part the cause of his death, or defendant has shown such negligence by a preponderance of the testimony. *McVey v. Railway Co.*, 46 W. Va. 120.

o. Concerning duty of person injured to stop, look and listen—Presumption as to.

The court instructs the jury that there is no presumption that a deceased person, killed by a train of cars, did not stop and look towards a train; and failure on part of the plaintiff to offer proof that he did look does not create such presumption, unless the evidence shows that he must have seen the approaching train if he had looked in its direction. *McVey v. Railway Co.*, 46 W. Va. 120.

11. EJECTION OF PERSONS FROM FREIGHT TRAINS.

- a. With whom power or authority to eject rests.
- b. Same.
- c. When instruction of railroad companies do not take away the power or authority of conductors.

a. In whom power or authority to eject rests.

The court instructs the jury that in absence of proof to the contrary, the power or authority to eject any and all trespassers from the freight train upon which the plaintiff was attempting to ride, after the train had been signalled to leave the yard at ———, by the conductor, and going ——— on the main track on its regular trip, and upon which said conductor had taken his position, belonged to the conductor thereof, and as such conductor, he could not exercise his power or authority so as needlessly or wantonly to cause injury to another, even to a trespasser on his train; and if the jury believe from the evidence that such conductor did exercise such power or authority by commanding or ordering said plaintiff to be kicked or forced from said train while the said train was going at such a rate of speed as to make it unsafe or dangerous to life or limb to thus eject said plaintiff from said train, and if the jury further believe that plaintiff was so forced or ejected from said train and thereby and in consequence thereof said plaintiff sustained personal and physical injury, the jury are authorized under such circumstances, to find a verdict for the plaintiff, and to assess his damages as such sum as the evidence may justify, not to exceed the sum laid in the declaration. *Landers v. Railroad Co.*, 46 W. Va. 498.

b. Same.

The court instructs the jury that when a railroad train is running on the main line of its road in the course of its regular run, and is manned by a conductor, engineer, fireman, and brakeman, like the one shown in the evi-

dence here, in the absence of proof to the contrary, all power to eject rests impliedly, under the law, with the conductor, and such power must be exercised either by such conductor or by some one else acting under his order or command. *Landers v. Railroad Co.*, 46 W. Va. 498.

c. **When instructions of railroad company do not take away the power or authority of conductors.**

The court instructs the jury that the special instruction offered in evidence, reading as follows: "Agents and yard masters will have charge of and direct movement of all trains and trainmen in ———, ——— and ———, ——— yards," does not take away the power and authority implied, possessed under the law by the conductor of a through freight train to protect and care for his own train, while the same may have been on the main track, going on its regular run ———, with the conductor and the rest of the crew aboard, after the yard master had signalled the conductor to leave, then such conductor, after his train had started and was moving on the main line on its through run (although it may have been at the time within the yard limits of the railroad company), had the authority to order a trespasser from its train; and if the jury believe from the evidence that said conductor ordered the plaintiff ejected from his said train under such circumstances, then such conductor was acting in the line of his duty, and within the scope of his duty, and implied powers, in the absence of evidence conferring such authority upon some one else then on the said train. *Landers v. Railroad Co.*, 46 W. Va. 499.

III. INJURIES TO ANIMALS.

- a. Injuries occurring on track.
- b. Injuries occurring at private crossings—Gross negligence.
- c. Same.

a. Injuries occurring on track.

The court instructs the jury that if they believe from the evidence that the plaintiff's cattle wandered upon the railroad of the defendant without his knowledge, and being there were killed or injured by a passing train of cars in charge of the defendant's servants; and if they further believe from the evidence that the servants of the defendant in charge of the train could, by the exercise of reasonable care and precaution, after they saw the cattle of the plaintiff on the railroad track, have avoided injury to them, and they failed to use such reasonable care and precaution, the jury should find for the plaintiff. *Hacker v. Railroad Co.*, 15 W. Va. 642.

b. Same—Injuries occurring at private crossing—Gross negligence.

The court instructs the jury that if they believe from the evidence that the plaintiff suffered his cattle to wander on the railroad track of the defendant, at a crossing, at a time when a passenger train was due, and that the plaintiff knew that the passenger train was accustomed to pass at the time the cattle were suffered to wander on said railroad, this constitutes negligence on the part of the plaintiff, and the railroad company cannot be held liable in damages for any injury to the plaintiff's cattle from being struck by the train under such circumstances, unless the jury believe from the evidence that such crossing was a private crossing in a lane leading from one field of plaintiff's farm to another, constructed and used for that purpose, by the authority and with the consent of the defendant, and that the injury to the cattle was caused by the gross negligence of the defendant. *Baylor v. Railroad Co.*, 9 W. Va. 274.

c. Same.

The court instructs the jury that if they believe from

the evidence that the cattle of the plaintiff wandered on to the railway track of the defendant, at the crossing in the declaration mentioned, in front of an approaching passenger train, when the engine was within — feet, or thereabouts, of said crossing, and that the said passenger train could not have been checked or stopped, so as to have prevented the injury, in the space of — feet, or thereabouts, by the ordinary appliances, then the defendant is not liable for killing the plaintiff's cattle at said crossing, and the jury should find for the defendant, unless they further believe from the evidence that after the defendant discovered that the said cattle were about to come upon the track, they might, by the exercise of proper care and prudence, have prevented the injury. *Baylor v. Railroad Co.*, 9 W. Va. 276.

IV. CAUSING LOSS OF PERSONAL PROPERTY.

- a. Burden of proof—Preponderance of evidence.
- b. Ordinary care—When exercised, defendant not liable.

a. Burden of proof—Preponderance of evidence.

The court instructs the jury that the burden of proof is on the plaintiffs to show the negligence complained of, and if they have failed to show by a preponderance of the evidence, that the accident resulted from the negligence of the defendant, their verdict must be for the defendant. *Fawcett v. Railway Co.*, 24 W. Va. 757.

b. Same.

The court instructs the jury that if they believe from the evidence that the defendant, by its agents and servants, was operating its road in such manner as prudent and reasonable agents would operate it under like circumstances, and said agents and servants were using ordinary

care in the discharge of their duties, then the defendant is not liable in this action. *Fawcett v. Railway Co.*, 24 W. Va. 758.

V. INJURY TO REAL ESTATE.

- a. Value of property immediately before and immediately after construction of railroad.
 - b. Same—When no part of property taken.
 - c. Permanent injuries—When value of property depreciated.
-
- a. Value of property immediately before and immediately after construction of railroad.

The court instructs the jury that if they believe from the evidence that the plaintiff's property was worth as much immediately after the construction of the defendant's railroad as it was immediately before said railroad was constructed, then they shall find for the defendant. *Stewart v. Railroad Co.*, 38 W. Va. 444.

- b. Same—When no part of property taken.

The court instructs the jury that when an action is brought to recover damages, where no part of the plaintiff's property has been taken, but simply damaged by a public improvement, damages cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was immediately before the improvement was made, no damages can be sustained and no recovery can be had. Therefore, if the jury believe from the evidence that the fair market value of the plaintiff's property was as much immediately after the construction of the defendant's railroad as it was immediately before, then he

has sustained no damages which can be the subject of a recovery in this suit, and they should find for the defendant. *Stewart v. Railroad Co.*, 38 W. Va. 444.

c. Permanent injuries—When value of property depreciated.

The court instructs the jury that if they believe from the evidence that the property of the plaintiff has been permanently injured and its value depreciated by the laying and construction of the embankment and railroad track, and that the defendant constructed and laid, or had constructed and laid by its agents, the said embankment and track, then the plaintiff is entitled to recover damages. *Hast v. Railroad Co.*, 52 W. Va. 402.

VI. INJURIES TO A WATER MILL.

- a. Burden of proof—Nominal damages.
- b. Necessity for proving specific cause of injury.

a. Burden of proof—Nominal damages.

The court instructs the jury that the burden is upon the plaintiff to prove to them the damages, if any, which he has suffered by reason of the alleged wrongful act of the defendant, and wherein and what such damages are; and if the plaintiff has failed to prove any damages, although he proves the wrongful act by the defendant whereby his water power was diminished, the jury can give only nominal damages. *Watts v. Railroad Co.*, 39 W. Va. 208.

b. Necessity for proving specific cause of injury.

The court instructs the jury that if the plaintiff would recover for loss of profits in operating said mill consequent upon the alleged wrongful acts of the defendant, it is his duty to prove wherein, when and what profit he lost, and the amount thereof, as near as may be; and it

is not sufficient for him to prove simply that his water power has been diminished, thus lessening the amount of work done in a given time, but he must go further, and show that custom and work were tendered and refused because of incapacity to meet the demand, or that it took him so much longer to accommodate the custom so offered, and prove with some degree of certainty, or approximation, the extra time so required and cost expended. *Watts v. Railroad Co.*, 39 W. Va. 208.

VII. CONSTRUCTION OF CROSSINGS AND CATTLE GUARDS.

- a. Convenient crossings.
- b. Construction of gates in lieu of cattle guards.

a. Convenient crossings.

The court instructs the jury that if they believe from the evidence that the railroad company did construct convenient crossings on the plaintiff's land at the time the road was opened for business, then the plaintiff cannot now complain of the failure to construct other crossings at other points on his lands, *provided*, they believe from the evidence that the crossing so constructed was convenient. *Clarke v. Railroad Co.*, 39 W. Va. 743.

b. Construction of gates in lieu of cattle guards.

The court instructs the jury that they have the right to consider the construction of the gates by the defendant at the crossings in connection with the other evidence in the case, in arriving at a conclusion whether or not the defendant has failed to construct suitable cattle guards, and if they believe from the evidence that the construction of the gates by the defendant was sufficient to prevent cattle and other stock from going upon the said railroad, then they have a right to consider this in arriving at a conclusion as to the necessity for the construction of cattle guards. *Clarke v. Railroad Co.*, 39 W. Va. 744.

CHAPTER 60.**REAL ESTATE.**

- a. Commissions for making sale of real estate.
- b. Same—Consideration of contract for making sale.
- c. When agent entitled to commissions though sale not made.
- d. Same—Revocation of contract.

a. Commissions for making sale of real estate.

The court instructs the jury that if they believe from the evidence and all the circumstances that the defendant ———, employed ———, the plaintiff, to sell his farm at the price of \$——, and that the plaintiff did sell said farm at the price and upon the terms agreed upon in said contract of employment and if you further find from all the evidence and circumstances that said defendant was to pay said plaintiff \$—— for making said sale, then you should find for the plaintiff. *Ober v. Stephens*, 54 W. Va. 356.

b. Same—Consideration of contract for making sale.

The court instructs the jury that it is not necessary in order to support a contract, that the consideration should consist of any specified sum of money or article of value, but it may consist in an act to be performed, and if the jury believe from the evidence that ——— employed ——— to sell his lands for a remuneration stipulated in the contract, to be paid thereupon upon the sale of the lands, that this will be a sufficient consideration. *Rowan & Co. v. Hull*, 55 W. Va. 340.

c. When agent entitled to commissions though sales not made.

The court instructs the jury that if they believe from

the evidence that —— was a real estate agent, and as such agent, had a contract with the defendant, whereby he was to sell certain lands for him, and in pursuance of such contract he procured a purchaser within the time specified in said contract, who was able, ready and willing to buy on the terms upon which he was authorized in said contract to sell, the said —— is entitled to recover the commission stipulated in said contract, even though the jury further believe from the evidence that the said contract of purchase was never completed, if they believe the completion was prevented by the act or default of the defendant. *Rowan & Co. v. Hull*, 55 W. Va. 340.

d. Same—Revocation of contract.

The court instructs the jury that if they believe from the evidence that the plaintiff, ——, procured —— to examine said land with the view of purchasing the same, and did this before any revocation of their contract, and that the said —— afterwards made a *bona fide* offer to purchase said land at the price agreed upon in said contract in pursuance of his solicitation by said ——, then the said —— is entitled to recover his commission as stipulated in said contract. *Rowan & Co. v. Hull*, 55 W. Va. 340.

CHAPTER 61.

SABBATH BREAKING.

a. Work of necessity or charity—Burden of proof.

The court instructs the jury that the burden of proof is on the state to establish beyond reasonable doubt the

fact that the defendant pumped or operated certain oil wells in ——— county, on a Sabbath day, within one year prior to the finding of this indictment; and further, that the burden of proof is on the state to prove that such pumping or operating was not a work of necessity or charity. *State v. McBee*, 52 W. Va. 260.

CHAPTER 62.

SALES.

1. CONTRACT OF SALE.
2. DELIVERY AND ACCEPTANCE.
3. SHIPMENT OF GOODS TO WRONG PARTY.
4. NON-ACCEPTANCE.
5. TURNING GOODS OVER TO THIRD PARTY.
6. SHIPMENT OF GOODS IN EXCESS OF PURCHASE.
7. FAILURE OF CARRIER TO DELIVER GOODS.
8. FALSE REPRESENTATIONS BY SELLER.

1. CONTRACT OF SALE.

- a. Written contract—Absence of fraud.
- b. Verbal contract—Conditional sale.

- a. Written contract only evidence in determining terms of agreement.

The court instructs the jury that in the absence of fraud, the written contract dated the ——— day of ———, is the only evidence to be considered in determining the terms of the agreement between the plaintiff and defendant as to the goods sold and the price to be paid. *Hood v. Bloch*, 29 W. Va. 248.

b. Verbal contract — Conditional sale — Right of purchaser to determine whether goods satisfactory.

The court instructs the jury that if they believe from the evidence that the machine in question was sold to the defendant with the understanding and agreement that if it did not give satisfaction to the defendant the seller would take it back, then the defendant had a right to refuse to keep the machine if it did not in fact give him satisfaction and the burden of proving that it did give him satisfaction is on the plaintiff. *Osborne & Co. v. Francis*, 38 W. Va. 313.

2. DELIVERY AND ACCEPTANCE.

a. What constitutes delivery—Delivery of goods to carrier for shipment—Injury to goods after arrival at destination and while in care of carrier.

The court instructs the jury that if they find from the evidence that the plaintiff sold to the defendant the wheat in question, the same to be delivered in a railroad car of the ——— railroad company at the depot of said company in the city of ———; that within a reasonable time thereafter the plaintiff delivered to the said railroad company the said wheat for transportation in one of its cars, to said depot; that the said wheat was thereupon placed by the said company in one of its cars, to which was affixed, according to the usual course of business, the address of the defendants; and that the said wheat arrived in due course of transit, in the said car, and in proper condition at such depot, then the jury should find for the plaintiff, even though they should further believe that the said wheat was, after such arrival, injured or destroyed by water or otherwise. *Bloyd v. Pollock*, 27 W. Va. 84.

3. SHIPMENT OF GOODS TO WRONG PARTY.

a. Notice to seller of mistake in shipment.

The court instructs the jury that if they believe from the evidence that the sale of the flour in controversy was made by ——— to ——— for the firm of ——— & Co., at ———, and that said ———, (the salesman), caused the said flour to be shipped by plaintiffs to ——— & Co., (another firm), without instructions from said ——— & Co., (the other firm), and that said ——— & Co., (the other firm), notified the plaintiff within a reasonable time after the arrival of the flour at ——— of his mistake in the shipping of the flour, and that said ——— & Co., (the other firm), exercised no acts of ownership over said flour after they ascertained the contents of the car by opening it, then the jury should find for the defendant. *Thompson v. Douglass*, 35 W. Va. 345.

4. NON-ACCEPTANCE.

a. Notice of non-acceptance required—Failure of purchaser to return goods.

b. Same.

c. Same—Passing of title—Burden of proof.

a. Notice for non-acceptance required.

The court instructs the jury that if they believe from the evidence that the defendant received invoices of the goods in controversy, purporting that the defendant bought the goods of the plaintiffs, and also received the goods specified in the invoices, and did not return the goods within a reasonable time, or notify the plaintiffs within a like time that he would not accept the goods, then that the jury can consider these circumstances as tending to show that the plaintiffs sold the goods in

controversy to the defendants. *Bartholomae v. Paull*, 18 W. Va. 776.

b. Same.

The court instructs the jury that if they believe from the evidence that invoices or bills of particulars expressing that the defendant bought of the plaintiffs the goods in controversy, and that they had been or were about to be shipped to him as freight by railroad, were mailed by the plaintiffs to the defendant, and were received by him, and that the goods whose sale and arrival as indicated by such invoices were received in due time by the defendant from the railroad, then that these are circumstances tending to show a sale of the goods thus received, and would render the defendant liable to the plaintiffs therefor unless he, within a reasonable time, returns the goods to the plaintiff or gives them notice that he does not accept them. *Bartholomae v. Paull*, 18 W. Va. 775.

c. Passing of title—Burden of proof.

The court instructs the jury that if they believe from the evidence that the plaintiffs were the owners of ——— barrels of ——— described in the declaration and that the plaintiffs sent said ——— to ——— in the month of ———, to be delivered to W., or to some other person in his behalf, and if the jury further believe from the evidence that said W. after being notified that the ——— had been shipped, refused to buy or accept said ——— as a purchase, but that the said W. did afterwards take the same into his possession as the property of the plaintiffs with the understanding that he would hold the same for the plaintiffs and subject to their order—then so long as W. held such ——— under that arrangement, the ——— remained the property of the plaintiffs, and W. had no title thereto and could not pass title to the

—— or make lawful sale of the property. And if the jury believe from the evidence that W. did take such —— into his possession agreeing to hold it for the plaintiffs as their property as above set forth, then before the jury can find that the said —— became the property of W., the burden of proof is on the defendant to show by a fair preponderance of the testimony that W. lawfully acquired title to the property after agreeing to hold it for the plaintiffs. *Ullman & Co. v. Biddles*, 53 W. Va. 416.

5. TURNING GOODS OVER TO THIRD PARTY.

a. Consent of seller required.

b. Same—Acts of third party in offering goods for sale—Shipment of remaining goods back to seller—Agency.

a. **Concerning purchaser's right to turn goods over to third party without the consent of seller.**

The court instructs the jury that the defendant had no right to put the goods in controversy in the hands of any third party upon any kind of agreement whereby such party might appropriate the goods to his own use without first having obtained the plaintiff's consent thereto. *Bartholomae v. Paull*, 18 W. Va. 776.

b. **Same—Acts of third party in offering goods for sale**
When third party regarded as agent of purchaser
—Shipment of remaining goods by purchaser to seller.

The court instructs the jury that if they believe from the evidence that the defendant received invoices of the goods in controversy, purporting a sale of the goods by the plaintiffs to him, that the goods themselves were received by him and the freight paid on the same by him,

and that he without plaintiff's knowledge or consent turned the goods over to ———, either with or without an understanding between him and the defendant, that he, ———, was to treat with the plaintiffs for the goods, that ——— took charge of the goods, offered and showed them for sale, sold some or retained some in his own store from each of the bills of goods in controversy with the defendant's knowledge and consent, that the defendant took the residue of the goods in controversy from ———'s custody and shipped them back to the plaintiffs, then that the goods were in ———'s hands as the agent of the defendant; that ———'s acts in regard thereto are to be regarded as the acts of the defendant, and are as binding on him as though done by himself, and amount to an acceptance of said goods by the defendant, and render him liable to the plaintiffs therefor. *Bartholomae v. Paull*, 18 W. Va. 774.

6. SHIPMENT OF GOODS IN EXCESS OF PURCHASE.

a. When purchaser liable for acceptance of goods in excess of purchase.

The court instructs the jury that if they believe from the evidence that the defendant gave an order to the plaintiffs for a lot of goods, the kind and value of which was not agreed upon in terms, but the value was to be about \$300.00, that discretion was given to the plaintiffs, or their employe, ———, to select the goods for such an order, or any part of them, that the goods were to be shipped by the plaintiffs to defendant as manufactured, that they were shipped at different times as manufactured and shown in the bills of particulars in this case, and invoices or bills of particulars of each shipment expressing that the defendant bought the goods of the plaintiffs, and the manner of their shipment to the defend-

ant were sent by mail so as to reach the defendant in time to give notice to him of the kind, quantity and value of the goods about to arrive, that such invoices were received, that the goods arrived and were delivered to the defendant as stated in said invoices, that the defendant paid the freight on said several bills of goods, then that he is liable to the plaintiffs for all of said goods, though in excess of the amount of \$300.00, unless within a reasonable time, he returned or offered to return or gave notice that he would not accept the goods received because in excess of the quantity ordered. *Bartholomae v. Paull*, 18 W. Va. 775.

7. FAILURE OF CARRIER TO DELIVER GOODS.

- a. Agreement of seller as to shipment of goods.
- b. Liability of purchaser, though carrier fail to deliver goods.

a. Agreement of seller as to shipment of goods.

The court instructs the jury that if they believe from the evidence that the plaintiff sold to the defendant the wheat in question and agreed to deliver the same in a car belonging to the ——— railroad company at the depot of said company in ———; that within a reasonable time thereafter the plaintiff shipped the said wheat in a car, properly addressed, of the said company; that the said car so containing the said wheat duly arrived at the said depot, then from and after such arrival, the said railroad company was not the agent of the plaintiff with respect to said wheat, and no responsibility attaches to the plaintiff by reason of any failure, if failure there was, on the part of the said railroad company to give notice to the defendants of such arrival. *Bloyd v. Pollock*, 27 W. Va. 84.

b. Liability of purchaser, though carrier fail to deliver goods.

The court instructs the jury that if they believe from the evidence that the defendant bought the wheat in the testimony referred to; that the same was to be delivered by the plaintiff in a car of the ——— railroad company at the freight depot of said company in the city of ———, and that the car containing said wheat duly arrived at said depot, with the said wheat in good condition, then from the time of such arrival the said ——— belonged to the defendant, and their liability to pay for the same attached, even though there may have been a failure on the part of the railroad company to notify the defendant of such arrival. *Bloyd v. Pollock*, 27 W. Va. 85.

8. FALSE REPRESENTATIONS BY SELLER.

a. Reliance by purchaser upon representations of seller—False representations, though not fraudulent, avoid contract.

b. Same—Condition of goods sold as compared with that delivered.

a. Reliance by purchaser upon representations of seller — false representations, though not fraudulent, avoid contract.

The court instructs the jury that if a seller, in order to induce a sale, makes a false representation as to any material fact, by which the purchaser is misled to his injury, and in which the purchaser is presumed to have trusted to the seller, then the contract founded on such representations is void, whether the seller knew the representations to be false at the time they were made or not, and whether made with a fraudulent intent or not. *Hood v. Bloch*, 29 W. Va. 250.

b. Same—Condition of goods sold as compared to that delivered.

The court instructs the jury that in considering the question of fraud or misrepresentation in the procurement of the contract of sale, you must first find the condition of the cheese on the —— day of ——, as compared with the lot sold to the defendant by plaintiff. *Hood v. Bloch*, 29 W. Va. 248.

CHAPTER 63.

SEDUCTION.

**a. Action by father for seduction of minor daughter—
Father's control over and right of services of
daughter.**

The court instructs the jury that if they believe from the evidence in this cause that the plaintiff did sustain loss of services of his daughter, and that such loss of service was occasioned by the seduction and wrongful act of the defendant, then you may take into consideration the shame, loss of respect and mortified feeling of the plaintiff, and give such exemplary damages as you may believe the plaintiff entitled to. The jury are further instructed that if they believe from the evidence in this case that the daughter of the plaintiff was seduced by the defendant whilst at the defendant's house and in his employ, and that she was under the age of twenty-one years, then unless the evidence in this cause should satisfy you that the plaintiff had relinquished all control over the daughter and all right to her services, the law presumes that the plaintiff is entitled to her services, and any loss of services sustained by the plaintiff occa-

sioned by such act of seduction, does entitle the plaintiff to recover. *Riddle v. McGinnis*, 22 W. Va. 262.

CHAPTER 64.

STREET RAILWAYS.

(See also *Mannon v. Railway Co.*, 56 W. Va. 554, and *Sample v. Railway Co.*, 50 W. Va. 472.)

LIABILITY AS CARRIERS OF PASSENGERS.

- a. Presumption of negligence—Burden of proof.
- b. As to liability when no negligence shown.
- c. Contributory negligence—Burden of proof.
- d. Same—Acts done by person injured through fright or excitement.
- e. Same—What to be considered in determining as to negligence.
- f. Same—How responsibility for contributory negligence escaped.
- g. Same—Care required of person injured.
- h. When contributory negligence one of the causes of injury.
- i. Same.

a. Presumption of negligence—Burden of proof.

The court instructs the jury that where a passenger is injured by any accident attending the running of a street car, the presumption is that it occurred by the negligence of the driver; and the burden of proof is then on the proprietors of the street car to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable

casualty, or by some cause which human care and foresight could not prevent. *Dimmey v. Railroad Co.*, 27 W. Va. 52.

b. No liability when no negligence is shown.

The court instructs the jury that if they believe from the evidence that neither the defendant, its agents or employes in charge of the car at the time the accident in question occurred, were negligent in the conduct or operation of the car, then the plaintiff is not entitled to recover, and the jury should find a verdict for the defendant. *Normile v. Traction Co.*, 57 W. Va. 132.

c. Contributory negligence—Burden of proof.

The court instructs the jury that with respect to the question of contributory negligence on the part of the decedent, the burden of proof is on the defendant, *Dimmey v. Railroad Co.*, 27 W. Va. 52.

d. Same—Acts done by persons injured through fright or excitement.

The court instructs the jury that if the deceased through fright or excitement, did at the time of the accident that which a reasonably prudent and careful person, of the same class, would not have done under the the same circumstances, and such act on her part contributed immediately to the injury, the plaintiff cannot recover, and the jury must find for the defendant. *Dimmey v. Railroad Co.*, 27 W. Va. 53.

e. Same—What to be considered.

The court instructs the jury that in ascertaining whether a person has been negligent or not, it is proper to consider the circumstances in which he is placed, so that what might be negligence under some circumstances, might not be so under others, and so that it might be

proper for one to do in view of imminent danger that which would, at other times, be considered rash, yet this rule only permits a person to do what persons of ordinary prudence of the same class would have done under like circumstances; therefore if ———, at the time of the accident did what ordinarily prudent and careful persons of the same class would not have done under similar circumstances, and if such act on her part contributed immediately to the injury, then the plaintiff cannot recover. *Dimmey v. Railroad Co.*, 27 W. Va. 52.

f. Same—How responsibility of contributory negligence escaped.

The court instructs the jury that to escape the responsibility of contributory negligence, a plaintiff in an action for damages for an alleged negligence of another, is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which such plaintiff belongs. *Normile v. Traction Co.*, 57 W. Va. 132.

g. Same—Care required of person injured.

The court instructs the jury that in considering the question of contributory negligence, that the jury are instructed that the decedent was not required to exercise more care than is usual in similar circumstances among careful women. *Dimmey v. Railroad Co.*, 27 W. Va. 52.

h. When contributory negligence one of the causes of injury.

The court instructs the jury that if they believe from the evidence that the plaintiff did not exercise due and reasonable care in attempting to get on the car on the evening of the accident and that her negligence in this respect contributed to and was one of the causes of the accident, then even although the defendant or its agents or employes may have been negligent in the running of

the car, yet the plaintiff is not entitled to recover and the jury should find a verdict for the defendant. *Normile v. Traction Co.*, 57 W. Va. 132.

i. Same.

The court instructs the jury that if they believe from the evidence that in the exercise of reasonable care in attempting to get on the car on the evening of the accident, it was the duty of ——— at the same time when she placed her right foot upon the step of the car to take hold of one of the rails, and that because she had her arms and hands otherwise engaged she did not do so and that it was negligent on her part not to do so and that this negligence on her part contributed to and was one of the causes of the accident, then even although the jury should also find from the evidence that the defendant or its employes were negligent the plaintiffs are not entitled to recover and the jury should find a verdict for the defendant. *Normile v. Traction Co.*, 57 W. Va. 132.

CHAPTER 65.

SURETYSHIP.

a. When payee may elect to hold persons endorsing on back of note as original promissors, or endorsers.

The court instructs the jury that if they believe from the evidence that at the time the note in question was delivered to the plaintiff, that it was made payable to him, was signed by ——— and had written on the back the name of ——— and ———, that then the said plaintiff is entitled to hold them as joint makers, and if it is shown by the evidence that said ——— and ———

signed their names on the back of said note at the time it was made as security for the maker and for his accommodation to give him credit with the payee such proof does not alter the right of the payee to hold them bound as original promissors or as guarantors or as endorsers as he may elect, but strengthens his *prima facie* right to elect. *Parsons v. Harrold*, 46 W. Va. 127.

CHAPTER 66.

SURFACE WATER.

- a. Liability of municipal corporation for casting surface water upon the property of an individual.
 - b. Drains for cellars—Municipal corporations not required to furnish.
 - c. Same—Raising grade of streets.
 - d. Same—Injuries resulting from other causes.
-
- a. Liability of a municipal corporation for casting surface water upon the property of an individual.

The court instructs the jury that in disposing of surface water, a municipal corporation has no right, by any means whatever, to collect and cast the same upon the property of an individual. *Clay v. City of St. Albans*, 43 W. Va. 546.
 - b. Drains for cellars—Municipal corporations not required to furnish.

The court instructs the jury that the law does not require the city of ——— to furnish a drain or sewer to carry water away from the cellar on the premises in the plaintiff's declaration described, or away from said premises. *Jordan v. City of Benwood*, 42 W. Va. 322.

c. Same—Raising grade of streets.

The court instructs the jury that the fact that the city of ——— raised the grade of ——— street and of alley ———, so as to prevent water flowing from the cellar on the premises in the plaintiff's declaration described, or away from said premises, upon either said street or said alley, will not of itself entitled the plaintiff to recover damages in this action. *Jordan v. City of Benwood*, 42 W. Va. 322.

d. Same—Injuries resulting from other causes.

The court instructs the jury that if they believe from the evidence that the city of ——— since ———, 18—, and before the bringing of this suit, has damaged the premises described in the plaintiff's declaration otherwise than by preventing the water from flowing therefrom upon ——— street or upon alley ———, their verdict must be for the defendant. *Jordan v. City of Benwood*, 42 W. Va. 322.

CHAPTER 67.

TELEGRAPH AND TELEPHONE COMPANIES.

I. TELEGRAPH COMPANIES.

II. TELEPHONE COMPANIES.

I. TELEGRAPH COMPANIES.

- a. Rules of companies—Reasonable rules.
- b. Delay in transmitting and delivering messages.
- c. Same—Repeating messages.
- d. Same—Liability of telegraph company for profits arising from sales.

a. Rules of telegraph companies—Reasonable rules.

The court instructs the jury that if they believe from

the evidence that the ——— telegraph office at ———, had a rule that messages would not be received or delivered after 9 o'clock in the evening and before 8 o'clock in the morning, then that was a reasonable rule, and the plaintiff cannot recover any damages in this case for the failure of the defendant to deliver it before 8 o'clock in the morning of ———, ———, although it may have come to the ——— office at 1 o'clock A. M., of said ———, ———. *Davis v. Telegraph Co*, 46 W. Va. 50.

b. Delay in transmitting and delivering messages.

The court instructs the jury that if they believe from the evidence that ——— of ——— sent the plaintiff the telegram offered in evidence dated ———, ———, asking for quotation of prices on the lumber mentioned in said telegram, and that the plaintiff prepared and delivered to defendant's operator at ——— station, the reply to said telegram which has been offered in evidence dated ——— ———, and that through the neglect of defendant said reply was never delivered to said ———, and even if the jury further believe that in case said reply had been delivered and said ——— had ordered said lumber at the prices quoted in said reply and plaintiff had delivered said lumber to ———, in pursuance to said order the plaintiff would have made a profit of \$——, per thousand feet on said lumber, still such profits cannot be allowed by the jury in favor of the plaintiff in making up their verdict in this case. *Beatty Lumber Co. v. W. U. Telegraph Co.*, 52 W. Va. 420.

c. Same—Repeating messages.

The court instructs the jury that if they believe from the evidence that the plaintiff did not request the operator of defendant, to whom the message to ———, which has been offered in evidence, was delivered, to have said message repeated, and did not pay or offer to pay said

operator the regular additional charge for repeated messages as prescribed by the terms on the back of said message, then the defendant is not liable to the plaintiff for any damages for the non-delivery of said message beyond the amount received for sending the same. *Beatty Lumber Co. v. W. U. Telegraph Co.*, 52 W. Va. 420.

d. Same — Liability of telegraph company for profits arising from sales.

The court instructs the jury that the defendant is not liable to plaintiff for any profits which plaintiff would have made out of the proposed sale of the lumber in question to ———, if they believe from the evidence that no contract was in fact made with said ——— for sale of said lumber. *Beatty Lumber Co. v. W. U. Telegraph Co.*, 52 W. Va. 420.

II. TELEPHONE COMPANIES.

- a. Duty of telephone company as to placing and maintaining wires.
- b. Injuries resulting from negligence of telephone company.
- c. Care and caution required of person injured.

a. Duty of telephone company to place, support and maintain its wires by proper means and appliances.

The court instructs the jury that the defendants in erecting and maintaining the telephone line mentioned in the declaration, were bound to place, support and maintain its wires by good, reliable and efficient means and appliances, so as not, in any way, to interfere with the use as a public highway of the road leading from the town of ———, in ——— county, to the town of ———, in ——— county, and if said defendants failed to provide good, reliable and efficient means and appliances

to support and maintain said wire, and by such failure it was stretched across said highway, near the ground, and interfered with the plaintiff in the use of said highway as a public highway, then they are guilty of negligence. *Hannum v. Hill*, 52 W. Va. 176.

b. Injuries resulting from negligence of telephone company.

The court instructs the jury that if they believe from the evidence that the plaintiff was injured by being thrown from his horse, as complained of in the declaration, and that the negligence of the defendants was the proximate cause of the injury received by the plaintiff, then they must find a verdict for the plaintiff. *Hannum v. Hill*, 52 W. Va. 176.

c. Care and caution required of person injured.

The court instructs the jury that even if they find that the plaintiff was injured by the negligence of the defendants as alleged in his declaration, that then in ascertaining the amount the plaintiff is entitled to recover they have a right to consider whether the plaintiff is entitled to recover, they have a right to consider whether the plaintiff exercised proper care and medical treatment of himself after receiving the injury complained of, and if the jury further believe that the injury, if any, received by the plaintiff was aggravated by his lack of proper care and caution on the part of the plaintiff, then plaintiff is not entitled to recover anything for such aggravated injury. *Hannum v. Hill*, 52 W. Va. 178.

CHAPTER 68.**TRESPASS.****a. Possession of land—Necessity for plaintiff to prove.**

The court instructs the jury that in order for the plaintiff to maintain his action he must prove that at the time the alleged trespass was committed, he was either in the actual or *constructive* possession of the land on which the same was committed. *Storrs v. Feick*, 24 W. Va. 608.

CHAPTER 69.**TROVER AND CONVERSION.****a. Right of title to and right to possession of property.****b. Delivery of goods—Authority to dispose of.****a. Right of title to and right to possession of property.**

The court instructs the jury that the plaintiff has no right to recover in this action unless he show that at the time this suit was brought he had the right of property in the said ———, or any part he may show himself entitled to, and also that he had the right to the possession of said ———, or part thereof. *Haines v. Cochrans*, 26 W. Va. 722.

b. Delivery of goods—Authority to dispose of goods.

The court instructs the jury that if they find from the evidence that the plaintiff delivered, or caused to be de-

livered to —— the notes sued on, with authority to dispose of the same, said notes or the money for them to be returned to the plaintiff, and further find that said —— sold and delivered the said notes to the defendant, then the jury must find for the defendant; and that such authority might be either expressed or implied. *Carder v. Bank*, 34 W. Va. 40.

CHAPTER 70.

TURNPIKE COMPANIES.

- a. Adverse interests—Authority of county court.
- b. Same—Unauthorized act of county court.

a. Adverse interests—Authority of county court.

The court instructs the jury that if they believe from the evidence that the interest which the State of West Virginia owned in said turnpike was only the right to hold so many shares of stock in said turnpike company, then chapter 39, Code, nor any section under it, gave any right to the county court of —— county to take possession, without the consent of the company, of said lot in controversy, unless the same had been condemned; and if the jury further believe from the evidence that the only title under which the county court, through its agent, entered upon the premises was the order or orders of the county court taking possession of said turnpike, then said entry was unlawful and said agent was a trespasser. *Moore v. Shoppert*, 22 W. Va. 285.

b. Same—Unauthorized acts of county court.

The court instructs the jury that if they believe from the evidence that at the time of said entry by the agent

of the county court, the said turnpike company was actually managing and controlling the same through its officers and agents under the provisions of its charter, then the entry by the agent of the county court of ——— county, was unlawful and a trespass. *Moore v. Shoppert*, 22 W. Va. 285.

CHAPTER 71.

UNLAWFUL ENTRY AND DETAINER.

- a. Forcible entry and detention of possession.
 - b. Same—Statute of limitations.
 - c. Same—Possession under lease—Question of title.
 - d. Same — Possession under grantor — Boundaries—
Prior possession.
 - e. Right of action by lessee—Abandonment of lease.
 - f. Abandonment of possession.
 - g. Same—Acts and declarations of defendant.
 - h. Deception practiced by defendant.
 - i. Forfeiture of plaintiff's title—Knowledge of by
defendant—Agency.
 - j. Same—Forfeiture of land for non-payment of taxes—
When sale does not forfeit plaintiff's rights.
 - k. Same — Disclaimer by defendant.
 - l. Within what time action must be brought.
-
- a. Forcible entry and detention of possession.
- The court instructs the jury that if they believe from the evidence that the defendant made a forcible entry upon the lands described in the writ, and that he detained the possession of the same at the date of the issuing of this writ, then the verdict should be for the plaintiff, unless they should find further, that the de-

fendant had been in possession three years before the bringing of this suit. *Franklin v. Geho*, 30 W. Va. 31.

b. Same—Statute of limitations.

The court instructs the jury that if they believe from the evidence that the plaintiff was in possession of the land in question, and that the defendant adhered upon the same and forcibly turned the plaintiff out of the possession and kept him turned out of the possession up to the time of the bringing of this suit, then you will find for the plaintiff, unless you find that the defendant has been in the possession of the land for three years before the date of the summons therein. *Franklin v. Geho*, 30 W. Va. 31.

c. Same—Possession under a lease—Question of title not to be regarded.

The court instructs the jury that if they believe from the evidence that the plaintiff, under the lease made to him by ——— and others, entered into and took quiet and peaceable possession of the premises embraced in said lease, claiming the same thereunder up to the boundaries thereof, and that the defendants unlawfully or forcibly entered upon his said possession and ousted him from the same, or any part thereof, within three years prior to the institution of this suit, then the plaintiff is entitled to recover the same in this action, or such part thereof as he was ousted of without regard to the question of title. *Moore v. Douglass*, 14 W. Va. 721.

d. Same — Possession under grantor — Consideration of question of boundaries—Prior possession of defendant.

The court instructs the jury that if they believe from the evidence that the plaintiff entered into and took possession of his lease, claiming the same, and the defend-

ants entered upon his possession and ousted him from the same, or any part thereof, claiming to hold the same under ——— and wife, who claimed under the deed from ——— to ——— (the wife), then if they further believe that the boundaries contained in said deed do not cover or embrace the land in controversy, or any part thereof, and that they did not hold possession for three years prior to the institution of this suit, they must find for the plaintiff for so much of said lease as he was ousted from by them, unless they further believe that ———, or those holding under him, had peaceable possession of the land in dispute prior to the possession of the plaintiff. *Moore v. Douglass*, 14 W. Va. 721.

e. Right of action by lessee—Abandonment of lease by plaintiff.

The court instructs the jury that if they believe from the evidence that the plaintiff leased the premises mentioned, and that his term had not expired, and that he had the possession thereof, and that the defendant, during the plaintiff's term, and while the plaintiff was so in possession by occupation or the cultivation of the land, leased said land and entered upon said premises without the consent of the plaintiff, then the jury should find for the plaintiff and ascertain his damages; but if the jury, on the other hand, believe from the evidence that the plaintiff had so rented, and that his term had not expired, yet that the plaintiff had abandoned his lease and his possession of the said land and premises, and that after such abandonment by the plaintiff of his lease and possession, the defendant rented said premises and entered thereon, then in that case the jury should find for the defendant. *Chancey v. Smith*, 25 W. Va. 406.

f. Abandonment of possession by defendant.

The court instructs the jury that if they believe from

the evidence that the defendant went upon the land in question and cut and hauled away grass, and attempted to and did, at three several times, partly erect a fence, and that after warning from plaintiff to depart, he did not return, and abandoned possession of the premises in question, and did not detain the possession thereof at the date of the commencement of this suit, then you must find for the defendant. *Franklin v. Gcho*, 30 W. Va. 37.

g. Same—Consideration of acts and declarations of defendant.

The court instructs the jury that no claim of ownership of the property or of intention of the defendant to hold the possession thereof made on about the —— day of ——, (about one month before the bringing of this suit), are sufficient to enable the plaintiff to recover, if the jury find from the evidence that the defendant did not in fact withhold the possession of the premises at the date of the commencement of this action; but the jury may take into consideration a claim of ownership made by the defendant and his declarations as to his possession of the same in connection with other evidence in determining whether in fact he was in possession of the premises at the commencement of this action. *Franklin v. Gcho*, 30 W. Va. 38.

h. Deception practiced by defendant in order to maintain possession.

The court instructs the jury that if they believe from the evidence that the defendant practiced a system of deceit towards the plaintiff, or his agent, with regard to the lands in question, acknowledging his title, while acknowledging that of an adverse claimant, disclaiming his title to one agent, and acknowledging it to his successors and to other persons, for the purpose of maintain-

ing his possession, and without taking the risk of an open, consistent, and continuous disclaimer and adverse claim, they are to regard his disclaimer as having no effect whatever. *Voss v. King*, 38 W. Va. 610.

i. Forfeiture of plaintiff's title—Knowledge of defendant as to—Defendant as agent of plaintiff—Disclaimer by defendant.

The court instructs the jury that if they believe from the evidence that the defendant, having learned of the forfeiture of plaintiff's title several years before the expiring of his lease, after such information, acknowledged himself to be the agent of plaintiff, as his tenant, they are not to regard such forfeitures as having any effect on plaintiff's title, unless they believe that subsequently to all such acknowledgments he made an open, consistent, and continuous disclaimer and adverse claim. *Voss v. King*, 38 W. Va. 609.

j. Same—Forfeiture of lands for non-payment of taxes—When sale for taxes does not forfeit plaintiff's right.

The court instructs the jury that if, from the evidence, they do not believe that the defendant disclaimed holding under the plaintiff in or about 18—, and do not believe from the evidence that plaintiff's title was subsequently to the running out of the lease destroyed, so as to put it out of the power of the plaintiff to recover it by redemption, they are not to regard the sales by the state as excusing the defendant from restoring the possession to the plaintiff. *Voss v. King*, 38 W. Va. 609.

k. Same—Disclaimer by defendant.

The court instructs the jury that if they do not believe that the defendant disclaimed holding under the plaintiff in 18—, or thereabouts, they are to disregard the evidence

tending to show that the plaintiff's title was forfeited. *Voss v. King*, 38 W. Va. 610.

1. Within what time action must be brought.

The court instructs the jury that if they believe from the evidence that the land in controversy has been unlawfully detained from the plaintiff, unless it was unlawfully detained for more than three years before suing out the summons, then they must find for the plaintiff. *Lawson v. Dalton*, 18 W. Va. 768.

[NOTE.—See Ch. 50, Sec. 21, Code, for limitation of the action before justices.]

CHAPTER 72.

WATER AND WATER COURSES.

CHANGING COURSE OF STREAM.

- a. Liability for changing the natural course of stream.
- b. Rights of defendant to property on his own ground
—Usual condition of stream.
- c. Same.

a. Liability for changing the natural course of a stream.

The court instructs the jury that in repairing, maintaining or replacing the bank of the run next his coke-ovens, the defendant has no right to change or narrow the natural course of the run so as to cause it to encroach upon the property of the plaintiff, or to wash away his ground; and if the jury believe from the evidence that in maintaining, repairing or replacing said bank, he has so narrowed or changed the natural course of the said

run, he is liable for any damages thereby occasioned. *Hargreave v. Kimberly*, 26 W. Va. 791.

**b. Rights of defendant when property on his own ground
—Usual condition of stream.**

The court instructs the jury that while the defendant, the run being on his land, had the right to deal with it as he saw fit, so that he did not cause the run, in its usual condition, to encroach upon the plaintiff's property, yet he had no right, by any constructions or obstructions, to divert the run from its natural course so as to cause it, in its usual condition, to encroach upon the property of the plaintiff, or to wash away his ground, and by the usual condition of the run is meant as well as its condition at times of ordinary and usual floods and freshets as its condition in dry weather. *Hargreaves v. Kimberly*, 26 W. Va. 791.

c. Same.

The court instructs the jury that the run being wholly on defendant's ground he had the right to deal with it in any way he saw fit so that he did not cause the run, in its usual condition, to encroach upon the plaintiff's property. The defendant is not liable to plaintiff for any washing, slipping or other injury to his property resulting from an extraordinary and unusual condition of the run, unless such damage to the plaintiff's property was rendered greater by the act of the defendant. *Hargreaves v. Kimberly*, 26 W. Va. 792.

CHAPTER 73.**WILLS.**

- a. Legal capacity, when shown, validity of will cannot be impeached.
- b. Less capacity required to make a will than to make a deed.
- c. Old age of itself not sufficient evidence of incapacity.
- d. Time to consider as to the competency of testator.
- e. Highest quality of mind not required of testator.
- f. Bequests to others than relatives—Consideration of.
- g. Not necessary that testator name all his children in his will.
- h. Favoritism or partiality of testator toward his children.
 - i. Fickleness of testator as concerns his children.
 - j. Fraud or undue influence in procurement of will—Burden of proof.
- k. Same.
- l. Same—Coercion of testator.
- m. Understanding of testator as to beneficiaries of will.
- n. Attestation of will—Necessity for—Mental and physical ability of testator to dissent from the signing and attestation of will.
- o. Same—While attesting witnesses engaged in signing will.
- p. Same.
- q. Manner of placing signature of testator to will—Subsequent acknowledgment and ratification of signature by testator.

- r. Same—Recognition by testator in presence of attesting witnesses of signature to will.
- s. Same—Testamentary capacity of testator.
- t. Manner of spelling testator's name.
- u. Assisting testator in placing his signature to will—Ratification of will.
- v. Same—Testator's knowledge of contents of will—Capacity to make dissent known.
- w. Same.
- x. Same.
- y. Attesting witnesses—Witnesses present at execution of will.
- z. Same—As to weight of evidence of physician who attended testator during his last illness.
- z1. Same.
- z2. Devisees — Opportunities of for knowing mental condition of testator.
- z3. Expert witnesses—How testimony regarded.
- z4. When opinion of experts can be given on testimony already in the case.
- a. **Legal capacity when shown validity of will cannot be impeached.**

The court instructs the jury that where legal capacity is shown, the validity of the will cannot be impeached, however unreasonable, imprudent or unaccountable it may seem to the jury or others, if the testator acted freely. *Nicholas v. Kershner*, 20 W. Va. 255.

- b. **Less capacity required to make a will than to make a deed.**

The court instructs the jury that it requires less capacity to make a will than it does to make a deed. *Nicholas v. Kershner*, 20 W. Va. 255.

- c. **Old age of itself not sufficient evidence of incapacity.**

The court instructs the jury that old age is not of it-

self sufficient evidence of incapacity to make a will. *Nicholas v. Kershner*, 20 W. Va. 255.

d. The time to consider as to competency of testator.

The court instructs the jury that the time to be looked to by the jury in determining the competency of the testator to make a will is the time when the will was executed. *Nicholas v. Kershner*, 20 W. Va. 255.

e. Highest quality of mind not required of testator—Testator must possess sufficient mind to know objects of bounty and comprehend disposition of property.

The court instructs the jury that in order for a man to make a valid will, it is not necessary that he should possess the highest qualities of mind, nor that he should have the same strength of mind that he may formerly have had; that the mind may be in some degree debilitated, the memory may be enfeebled; he may possess weakness of understanding, eccentricity of character, and even want of capacity to transact many of the ordinary business-affairs of life; but is sufficient, if he possess mind enough to understand the nature of his property, to know the object of his bounty and to comprehend the disposition of his property in its simplest forms. *Coffman v. Hedrick*, 32 W. Va. 132.

f. Bequests to others than relatives—Consideration of.

The court instructs the jury that if they believe from the evidence that there is a doubt of the competency of the said ———, deceased, to make a will, on the ——— day of ———, and that he had, at that time, relations living, of whom he knew, (whether nephews or nieces), and that by the paper writing of ———, ———, purporting to be his last will and testament, he devised and bequeathed all his property, real and personal, to others than his relations, then the fact that he made such

devise and bequest, is proper to be considered by the jury. *Ward v. Brown*, 53 W. Va. 265.

g. Not necessary that the testator name all his children in will.

The court instructs the jury that in order to make a valid will, it is not necessary that the testator should name all his children in it or give all of them a portion of his estate. If the jury believe he was mentally capable of understanding the disposition he was making of his property, and that he acted freely, then it is immaterial to whom he gives his property, whether all to one of his children or to strangers. If he has a disposing mind he has the right to do as he pleases with his property. *Nicholas v. Kershner*, 20 W. Va. 257.

h. Favoritism or partiality of testator toward his children.

The court instructs the jury that although they may believe from the evidence that the testator was influenced by feelings of resentment and dislike towards a part of his children and by feelings of affection and attachment towards others, and that these influenced him to give his whole estate to the one part and nothing to the others, still this is not of itself sufficient to make the will invalid. *Nicholas v. Kershner*, 20 W. Va. 257.

i. Fickleness of testator as concerns his children.

The court instructs the jury that although they may believe from the evidence that the testator was fickle and inconstant, and that at one time he favored one or more of his children, and at other times disliked those and favored others; still if they believe he acted freely and had the capacity to understand what property he had, and to whom he was giving it, the will is not invalid on that account; and if they believe his will was

caused by the extreme kindness and attention of the devisees, that will not constitute undue influence, which will invalidate the will. *Nicholas v. Kershner*, 20 W. Va. 257.

**j. Fraud or undue influence in procurement of will—
Burden of proof.**

Fraud or undue influence in the procurement of a will is not to be presumed, but the burden of proof lies upon the party who alleges it, to establish the same by evidence. It is not required that there be direct and positive proof of such fraud or undue influence, but it may be deduced from the established facts and circumstances of a given case. At the same time it will not be inferred from opportunity and interest merely on the part of those to whom the fraud or undue influence may be attributed. *McMechen v. McMechen*, 17 W. Va. 702.

k. Same.

The jury is instructed that if they are satisfied from the whole evidence in this case that the paper writing of ————, 18—, here offered for probate as the will of ————, deceased, was made by him by reason of an undue influence exercised upon his mind and will and would not have been made by him but for such influence, then they should find that the same is not his last will. *McMechen v. McMechen*, 17 W. Va. 711.

l. Same—Coercion of the testator.

The court instructs the jury that to constitute undue influence and make void, by reason thereof, a paper writing executed as a will, it is not necessary that the party making such paper writing should be controlled by any force, coercion or persuasion exercised at the time of the signing of said paper; it is all-sufficient to avoid the paper if, upon the evidence, the jury find by reason there-

of, that the disposition of the estate by the writing is not the disposition which the party desired and intended to make of the same. *Ferrell v. Forney*, 4 W. Va. 737.

m. Understanding of testator as to beneficiaries of will.

If the jury believe from the evidence that the testatrix, ———, understood or believed that the paper writing contained a provision for the use or benefit of her husband, ———, or his children, or both the husband and the children, and such provision is not contained in said paper writing, it is their duty to consider and weigh such evidence in ascertaining whether the paper writing is, or is not, the last will of ———. *Ferrell v. Forney*, 4 W. Va. 738.

n. Attestation of will necessity for—Mental and physical ability of testator to dissent from and prevent the signing and attestation of will.

The court instructs the jury that the attestation of the paper writing dated ———, ———, purporting to be the last will and testament of ———, deceased, given in evidence in this case, is absolutely necessary to its execution; and if the jury believe from the evidence that before this important part of the execution of said paper writing, and while it was duly done, said testator, by reason of unconsciousness, or mental or physical inability was unable to dissent from the attestation, and to arrest and prevent the same, by indicating his dissent or disapproval, if he had desired to do so, the said paper writing is not valid as a will. *Ward v. Brown*, 53 W. Va. 265.

o. Same—While attesting witnesses engaged in signing will.

The court instructs the jury that if the jury believe from the evidence that at the time the attesting witnesses

were requested to sign said paper and at the time they were engaged in signing the same, the said ——— did not possess sufficient consciousness to hear and understand and assent to said request or to dissent from the same if he had wished, or that he did not possess sufficient consciousness to recognize and understand what said attesting witnesses were doing, and to assent to their acts, or that he did not possess sufficient consciousness and sufficient physical strength to have dissented from the said attestation and to have arrested and prevented the same by indicating his dissent or disapproval if he had desired to do so, then the jury must find that the said paper is not the will of the said ———. *McMechen v. McMechen*, 17 W. Va. 713.

p. Same.

The court instructs the jury that if they believe from the evidence that ——— signed the name of the testator to the paper writing offered in evidence as his last will and testament dated ———, ———, and that at the time the attesting witnesses were engaged in signing the same the said testator did not possess sufficient consciousness to recognize and understand what said attesting witnesses were doing and to assent to their acts, or that he did not possess sufficient consciousness and sufficient physical strength to have dissented from the said attestation, and to have arrested and prevented the same by indicating his dissent or disapproval, if he had desired to do so, then the jury must find that the said paper is not the will of the said testator. *Ward v. Brown*, 53 W. Va. 264.

q. Manner of placing name of testator to will—Subsequent acknowledgment and ratification of signature by testator.

The court instructs the jury that if the jury believe

from the evidence that the paper writing of ———, 18—, here offered for probate, was signed by ——— himself, or by some other person in his presence and by his direction, in the presence of the attesting witnesses to said paper writing, and he was then of sound mind, and was then and there shortly afterwards acknowledged by said ——— before said attesting witnesses as his last will, and that the said paper-writing shortly after such acknowledgment was signed by the attesting witnesses in his presence, and that the testator, at the time said attesting witnesses signed the same, was of sound mind and physically able to assent to or dissent from such attestation, said acknowledgment made as aforesaid is not required by law and does not add to the legal validity of the will; but the jury in considering the state of mind of the said ——— should consider all the evidence in the case bearing upon that subject. *McMechen v. McMechen*, 17 W. Va. 710.

r. Same—Recognition by testator in presence of attesting witnesses of signature to will.

The court instructs the jury that if they are satisfied from the evidence that the testator, ———, knew his name was signed to the will, and that he acknowledged it in the presence of the two attesting witnesses, both in his presence at the time, then it is immaterial how the signature of the testator was placed upon said will, whether by one of the witnesses, by the testator or by both the witness and testator. The material matter for the jury to determine is, whether the said ——— knew his name was attached to the will, and that he recognized it as his will and signature in the presence of the attesting witnesses, both in his presence at the time of such acknowledgment. *Nicholas v. Kershner*, 20 W. Va. 258.

s. Same—Testamentary capacity of testator.

The court instructs the jury that it is not necessary that the subscribing witnesses to a will should see the testator sign, or that he should acknowledge to them the subscription of his name to be his signature, or even that the instrument is his will. If the testamentary capacity exist at the time, it is enough that he should acknowledge in their presence that the act was his, he having at the time knowledge of the contents of the instrument and the design that it should be the testamentary disposition of his property. If the jury believe from the evidence that the paper writing here offered for probate was subscribed by —— himself, and that such acknowledgment of said paper writing was made by him, the jury are instructed that such an acknowledgment is a recognition and ratification of his signature. If the jury believe from the evidence that the name of —— was subscribed to said paper writing by another, and that such an acknowledgment of said paper writing was made by said ——, the jury are instructed that such acknowledgment is a recognition and ratification of the signature as having been made for him in his presence and by his directions, and that, on that state of facts, it is wholly immaterial that said signature was written in full instead of being abbreviated in the usual manner in which said —— may have been in the habit of writing it.

But in considering the question of ratification the jury are to consider all the evidence in the cause relating thereto, including the mode of spelling the signature. *McMechen v. McMechen*, 17 W. Va. 708.

t. Same—Manner of spelling testator's name.

The court instructs the jury that if, after the writing offered for probate was written by the draftsman, the signature “——,” which appears at the end of said

writing, was put there by the said ——— himself or by another person in the presence of the said ———, and with his knowledge and assent, and the intention on his part that the said writing should be his will, then it is wholly immaterial that said signature was written in full instead of being abbreviated in the usual manner in which he may have been in the habit of writing it.

But it is proper for the jury to consider all the evidence, including the mode of spelling the same, in determining whether it was intended by the testator to be his signature to said paper. *McMechen v. McMechen*, 17 W. Va. 706.

**u. Assisting testator in placing his signature to will—
Mental and physical capacity of testator to dissent
from having his signature made to will—Ratifica-
tion of will.**

The court instructs the jury that if they shall find from the evidence that the time of the execution of the paper writing here offered for probate as ———'s will, that the testator was not able to write his own name, and that ——— did without the testator's request or consent take hold of the testator's hand and so write the testator's name thereto, that such signing of the testator's name to said paper is not in law, without more, a sufficient signing to make the same the true last will of ——— deceased; but if the said ——— afterwards acknowledged the said paper as his will, such acknowledgment is a ratification of such signature. *McMechen v. McMechen*, 17 W. Va. 711.

**v. Same—Testator's knowledge of contents of will—
Capacity to make dissent known.**

The court instructs the jury that if they believe from the evidence that ——— ——— permitted ——— to steady or guide his hand while making his signature to

the paper offered for probate, or even to make such signature for him, the said ——— knowing at the time the contents of said paper, and what said ——— was so doing, and the purpose thereof, and being mentally and physically able to make known by words or signs his dissent thereto had he wished to do so, such permission would be equivalent to a direction by said ——— to said ——— to make said signature, or assist in making the same as aforesaid. *McMechen v. McMechen*, 17 W. Va. 707.

w. Same.

The court instructs the jury that if they believe from the evidence that after the paper offered for probate was written by the draftsman, ——— took hold of the hand of ——— and therewith wrote the signature “———” appearing at the end of the paper, the signature so made is in law a sufficient signing of the paper by the said ——— as his will, if he intended the same to be his will, and submitted his hand to be so used with a view to his signature being made to the paper, and was mentally and physically capable at the time of making known by words or signs his dissent thereto had he wished to do so. *McMechen v. McMechen*, 17 W. Va. 707.

x. Same.

The court instructs the jury that if they believe from the evidence that when ——— attempted to sign the paper offered for probate, ———, by direction of the draftsman superintending the execution of the paper, took hold of the said ———’s hand and steadied or even guided it, and thus enabled him to sign the same, the signature so made is in law a sufficient signing of the paper by the said ——— as his will, if with the knowledge of the contents of the paper he submitted to his hand being so held or guided with a view to his signature

being made thereto, and was mentally and physically able at the time to make known his dissent thereto by words or signs had he wished to do so. *McMechen v. McMechen*, 17 W. Va. 707.

y. Attesting witnesses—Witnesses present at execution of will.

The court instructs the jury that the evidence of witnesses who were present at the execution of the will are entitled to peculiar weight, and especially is this the case with attesting witnesses. *Nicholas v. Kershner*, 20 W. Va. 255.

z. Same—As to weight of evidence of physician who attended testator during his last illness.

The court instructs the jury that if they believe from the evidence that ——— was the physician who attended the testator during his last illness and who had been his physician for at least three years previously thereto and that he was present at the execution of the will, and attested the same as a subscribing witness thereto and that said ——— is a credible person and a man worthy of belief then his evidence is entitled to great weight. *Ward v. Brown*, 53 W. Va. 268.

z1. Same.

The court instructs the jury that the evidence of physicians, especially those who attended the testator, and were with him considerably during the time it is alleged he was of unsound mind, is entitled to great weight. *Nicholas v. Kershner*, 20 W. Va. 255.

z2. Devisees and legatees—Opportunities for knowing mental condition of testator.

The court instructs the jury that statements or declarations made by devisees or legatees under the will as to the

incompetency of the testator to make a valid will are entitled to little or no weight, unless it is proven that such devisees or legatees had, prior to the time of making such statements or declarations, opportunities of knowing the mental condition of the testator; and the weight to be given to such declarations or statements will depend entirely upon the facts and opportunities the devisee or legatee is shown to have possessed at the time they were made. *Coffman v. Hedrick*, 32 W. Va. 132.

23. Expert witnesses—How testimony of regarded.

The mere opinions of witnesses not experts are entitled to little or no regard, unless they are founded on facts which warrant them. If the facts upon which the opinions are founded are frivolous, the opinions are worth but little or nothing. *Nicholas v. Kershner*, 20 W. Va. 256.

24. When opinions of experts can be given on testimony already in the case.

The court instructs the jury that the opinion of medical experts founded on testimony already in the case can only be given on a hypothetical case, and the hypothesis must be clearly stated, so that the jury may know with certainty, upon precisely what state of assumed facts the expert bases his opinion. *Kerr v. Lunsford*, 31 W. Va. 659.

CHAPTER 74.

WITNESSES.

a. Effect of failure to produce witness.

The court instructs the jury that if they believe from the evidence that the plaintiff relies in this case upon the proof of his claim that —— was the agent of the defendant in the employment of plaintiff on and after the —— day of ——, 18—, upon which his account herein sued for is based, it was the duty of plaintiff to produce said —— as a witness in his behalf, if the said —— is in the jurisdiction of this court, and that his failure to produce him is in law conclusive proof that his evidence would have been against him if produced. *Garber v. Blatchley*, 51 W. Va. 153.

[NOTE.—Matters relating to the competency and character of and the weight to be accorded the testimony of witnesses are given under appropriate subjects in both parts of this work.]

TABLE OF CASES—PART II.

GIVING THE WEST VIRGINIA AND VIRGINIA CITATIONS IN SUPPORT OF
EACH LEGAL PROPOSITION LAID DOWN.

The subjects printed in *italics* correspond to the sub-headings, pages and letters of the text.

Sub-headings, under which there are neither W. Va. nor Va. citations in support of the text therein contained, are omitted.

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ABELL v. INSURANCE COMPANY, 18 W. VA. 400.

283,a. *Action by insurer for cancellation of policy—Recovery of premiums paid by policy holder—How amount insurer entitled to to be determined.*

Va.; McVeigh v. Bank, 26 Gratt. 188.

292,b. *An action to cancel life insurance policy—Replication to plea of statute of limitations.*

Va.; Ficklin's Ex'r. v. Carrington, 31 Gratt. 219.

283,b. *Plea of statute of limitation by insurer.*

Va.; Ins. Co. v. Duerson's Ex'r., 28 Gratt. 644.

ARBENZ v. EXLEY & COMPANY, 52 W. VA. 476.

288,a. *When tenant not released from payment of rent by failure of landlord to make repairs—Independent covenant requiring landlord to make repairs.*

W. Va.; Allen v. Bartlett, 20-46; Kline v. McClain, 33-32.

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Va.; Thompson v. Pendall, 12 Leigh. 608.

B.

BANK v. KIMBERLAND, 16 W. VA. 555.

77,a. *Accord and satisfaction—What may be pleaded.*

Va.; Fant v. Miller, 17 Gratt. 216.

78,c. *Liability of creditor to debtor for negligence in collecting collateral accepted in discharge of debt.*

Va.; Fant v. Miller, 17 Gratt. 216.

78,b. *When acceptance by creditor of order operates as full satisfaction of debt.*

W. Va.; Huling v. Cabell, 9-526.

Va.; Anderson v. DeSeur, 6 Gratt. 363; Miller v. Mahew, 17 Gratt. 216.

BANK v. NAPIER, 41 W. VA. 481.

293,a. *What passes title to logs—What vests title to logs in purchaser.*

W. Va.; Morgan v. King, 28-1.

BARKER v. RAILROAD COMPANY, 51 W. VA. 423.

BARTHOLMAE v. PAULL, 18 W. VA. 771.

BARTLETT v. ARMSTRONG, 56 W. VA. 293.

BARRICKMAN v. OIL COMPANY, 45 W. VA. 634.

353,j. *Contributory negligence.*

W. Va.; Carrico v. R. R. Co., 39-86; Gerity v. Haley, 29-98; Industrial Co. v. Schultz, 43-470; McKelvey v. R. R. Co., 35-500.

353,k. *Contributory negligence—Burden of proof.*

W. Va.; Carrico v. R. R. Co., 39-86; Gerity's Adm'r v. Haley, 29-98.

348,a. *Gas furnished for domestic purposes—Dangerous substances—Care and skill required in its operations.*

W. Va.; Burns v. Coal Co., 27-288.

BAYLOR v. RAILROAD COMPANY, 9 W. VA. 270.

372,b. *Injuries occurring on track—Private crossing—Gross negligence.*

Va.; Trout v. R. R. Co., 23 Gratt. 619.

BEACH v. FRANKENBERGER, 4 W. VA. 712.

BEATTY LUMBER CO. v. W. U. TEL. CO., 52 W. VA. 410.

394,b. *Delay in transmitting and delivering messages.*

Same authorities as 395,d.

BEATTY LUMBER CO. v. W. U. TEL. CO., 52 W. VA.
410—Continued.

395,d. *Liability of telegraph company for profit arising from sales.*

W. Va.; Bodkin v. Arnold, 48-108; Hare v. Parkersburg,
24-554; Jones v. Adams, 8-568.

Va.; Newbrough v. Walker, 8 Gratt. 16.

394,c. *Repeating messages—Effect of failure to repeat.*

W. Va.; Brown v. Ex. Co., 15-812.

BENTLEY v. INSURANCE COMPANY, 40 W. VA. 729.

271,k. *Assignment of policy by insured to pay mortgage debt.*

W. Va.; Clarke v. Hogeman, 13-718; Colby v. Ins. Co., 37-
789; Sheppard v. Ins. Co., 21-368; Tingle v. Fisher,
20-497.

Va.; Davis v. Miller, 14 Gratt. 1; Garland v. Richeson,
4 Rand. 266.

BEYEL v. RAILWAY COMPANY, 34 W. VA. 538.

364,a. *Injuries caused by failure to give sufficient warning to
avoid the injury—Necessity for establishing negligence.*

W. Va.; Hawker v. R. R. Co., 15-528; Newsome v. R. R.
Co., 30-228; see also Christie v. R. R., 35-117.

Va.; R. R. Co. v. Morris, 31 Gratt. 200.

BLAIR v. CITY OF CHARLESTON, 43 W. VA. 62.

344,f. *Decrease of market value of property caused by grading
and paving of street.*

W. Va.; R. R. Co. v. Foreman, 24-662; Stewart v. R. R. Co.,
38-438.

Va.; Kanawha Co. v. Turner, 9 Leigh. 313; Muire v.
Falconer, 10 Gratt. 17.

345,i. *Enhancement of value of property by grading and paving
streets.*

W. Va.; R. R. Co. v. Foreman, 24-662; Hargreaves v. Kim-
berly, 26-787; State v. Welch, 36-690; Stewart v.
R. R. Co., 38-438.

BLOSS v. PLYMALE, 3 W. VA. 393.

BLOYD v. POLLOCK, 27 W. VA. 75.

386,b. *Liability of purchaser, though carrier failed to deliver
goods.*

W. Va.; R. R. Co. v. Morehead, 5-800; State v. Hughes, 22-
743.

Va.; Pleasants v. Pendleton, 6 Ran. 475.

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380,a. *What constitutes delivery—Delivery of goods to carrier for shipment—Injury to goods after arrival at destination, and while in care of carrier.*

W. Va.; State v. Hughes, 22-743, and authorities therein cited.

BODKIN v. ARNOLD, 48 W. Va 108.

333,a. *Allowance for permanent and valuable improvement—Improvements made when title deemed good.*

W. Va.; Bodkin v. Arnold, 32-566; Bodkin v. Arnold, 45-90; Cain v. Cox, 23-594; Dawson v. Grow, 29-333; Hall v. Hall, 30-779; Haymond v. Camden, 22-180; Lynch v. Andrews, 25-751; Williamson v. Jones, 43-563.

Va.; Bolling v. Lersner, 26 Gratt. 36.

BOSLEY v. RAILROAD COMPANY, 54 W. VA. 563.

129,j. *Delay in shipping cattle—Assessment of damages caused by.*

W. Va.; Beatty Lumber Co. v. W. U. T. Co., 52-412; Brown v. Express Company, 15-812; McGraw v. R. R., 18-361; Maslin v. R. R. Co., 14-180; Rathbone v. R. R. Co., 1-106.

Va.; R. R. Co. v. Sayre, 26 Gratt. 238.

BOWEN v. CITY OF HUNTINGTON, 35 W. VA. 682.

BRADY v. STILTNER, 40 W. VA. 289.

302,m. *Malicious prosecution—Waiver of preliminary examination prima facie evidence of guilt.*

W. Va.; Vinal v. Core, 18-2.

Va.; Maddox v. Jackson, 4 Mun. 462.

BRIDGE COMPANY v. BRIDGE COMPANY, 34 W. VA. 155.

151,a. *When all the property sought to be taken is not required.*

W. Va.; R. R. v. R. R., 17-812.

BULLINGTON v. RAILROAD COMPANY, 32 W. VA. 436.

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225,p. *Equity of redemption—Purchase of land by creditors.*

W. Va.; McCallister v. Cottrell, 24-174.

CARRELL v. MITCHELL, 37 W. VA. 130—Continued.

225,q. *Defeat of tax purchaser's title—Payment of taxes by creditor.*

W. Va.; Orr v. Wiley, 19-151; Williams v. Russell, 18-629.

CARRICO v. RAILROAD COMPANY, 35 W. VA. 389.

CARRICO v. RAILROAD COMPANY, 39 W. VA. 86.

130,e. *Liability of carrier for negligence of contractor.*

W. Va.; Carrico v. R. R. Co., 39-390.

Va.; R. R. Co. v. Sanger, 15 Gratt. 530.

130,d. *Liability of carrier for negligence of agents.*

W. Va.; Carrico v. R. R. Co., 35-389.

Va.; R. R. Co. v. Sanger, 15 Gratt. 230; R. R. Co. v. Wrightman, 29 Gratt. 432.

140,a. *Obstructions in dangerous proximity to R. R. track.*

W. Va.; Carrico v. R. R. Co., 35-389; Searles v. R. R. Co., 32-570.

Va.; R. R. Co. v. Sanger, 15 Gratt. 230.

140,c. *Exposure by passenger to danger.*

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141,g. *Knowledge of carrier of danger to which passenger exposed
When negligence of passenger does not relieve carrier
from liability.*

W. Va.; Carrico v. R. R. Co., 35-389; Downey v. R. R. Co., 28-732.

Va.; R. R. Co. v. Anderson, 31 Gratt. 812.

143,k. *Preponderance of evidence when contributory negligence
relied on.*

W. Va.; Riley v. R. R. Co., 27-446; Snyder v. R. R. Co., 11-14.

141,f. *When increased exposure by passenger to danger does not
prevent recovery for injury—Burden of proof.*

W. Va.; Carrico v. R. R. Co., 35-389.

Va.; R. R. Co. v. Anderson, 31 Gratt. 812; R. R. Co. v. Morris, 31 Gratt. 200.

198,e. *Physical suffering.*

W. Va.; Riley v. Ry. Co., 22-146; Wilson v. Wheeling, 19-325; Searles v. Ry. Co., 32-370.

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401,e. *Unlawful entry and detainer—Right of action by lessee—
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W. Va.; Duff v. Good, 24-682; Griffith v. McCoy, 8-201; Huffman v. Anderson, 9-817; Mitchell v. Carder, 21-277; Storrs v. Feick, 24-605; Todd v. Yates, 20-464.

Va.; R. R. v. Daniels, 20 Gratt. 344.

CHAPMAN v. TOWN OF MILTON, 31 W. VA. 384.

335,a. *Ownership of or control over streets.*

W. Va.; Curry v. Mannington, 23-14; Wilson v. Wheeling, 19-323; Sheff v. City of Huntington, 16-307; Va.; Noble v. City of Richmond, 31 Gratt. 271.

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134,d. *Arrest of passenger armed with a dangerous weapon.*

W. Va.; City of Charleston v. Beller, 45-44.

CLARKE v. RAILROAD COMPANY, 39 W. VA. 732.

376,a. *Construction of railroad crossing—Convenient crossing.*

W. Va.; Code, Ch. 42, Sec. 14.

CLAY v. CITY OF ST. ALBANS, 43 W. VA. 539.

346,a. *Liability of municipal corporation for casting surface water upon the property of an individual.*

Va.; Richmond v. Long, 17 Gratt. 375.

COAL COMPANY v. HOWELL, 36 W. VA. 489.

COLES v. INSURANCE COMPANY, 41 W. VA. 261.

270,i. *Incumbrances upon property—Absence of fraud on part of insured.*

W. Va.; Dietz v. Insurance Co., 31-851; Schwarzbach v. Insurance Co., 25-622.

COFFMAN v. HEDRICK, 32 W. VA. 119.

408,e. *Highest quality of mind not required of testator.*

W. Va.; See Nicholas v. Kershner, 20-256, citing Greer v. Greer, 9 Gratt. 330.

CONGROVE v. BURDETT, 28 W. VA. 220.

84,h. *Boundary lines—Natural boundaries or lines of marked trees—Courses and distances.*

W. Va.; Garrett v. Ramsey, 26-345.

84,a. *Enclosures—What intruder not limited to—Possession of part of the land—Interlocks.*

W. Va.; Garrett v. Ramsey, 26-345.

97,a. *Statute of limitations—Against both possession and title.*

W. Va.; Garrett v. Ramsey, 26-345.

221,g. *Color of title—Not necessary that evidence of be in writing.*

W. Va.; Garrett v. Ramsey, 26-345.

85,b. *Enclosures — Possession of any part of the land — Superiority of title.*

W. Va.; Garrett v. Ramsey, 26-345.

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220,d. *Source of title—Conflicting title arising from same source—Priority of recordation of deeds.*

W. Va.; Garrett v. Ramsey, 26-345; Core v. Faupel, 24-238.

Va.; Kincheloe v. Tracewell, 11 Gratt. 589.

221,e. *Superior title to, and adverse possession of a portion of the land.*

Same authorities as above.

97,b. *Statute of limitations against both possession and title—Superiority title.*

W. Va.; Garrett v. Ramsey, 26-345.

222,j. *Boundary lines—Natural boundary lines.*

W. Va.; Core v. Faupel, 24-238; Garrett v. Ramsey, 26-345.

Va.; Kincheloe v. Tracewell, 11 Gratt. 589.

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COULTER v. BLATCHLEY, 51 W. VA. 163.

100,f. *Employment of third party by agent—Ratification by principal of acts of agent.*

W. Va.; Curry v. Hale, 15-867; Dewing v. Hutton, 48-576.

358,b. *Agency—Acts, declaration and conduct of agents—Ratification of by principal.*

W. Va.; Curry v. Hale, 15-867; Dietz v. Insurance Company, 31-851; Dewing v. Hutton, 48-576; Powell v. Love, 36-96.

D.

DAVIDSON v. RAILWAY COMPANY, 41 W. VA. 407.

368,k. *Injuries to persons while trespassing on railroad tracks—Assessment of damages.*

W. Va.; Turner v. R. R. Co., 40-675.

367,h. *Duty of engineer and fireman to keep constant look-out for children.*

W. Va.; Carrico v. R. R. Co., 39-86; Gunn v. R. R. Co., 36-165; Raines v. R. R. Co., 39-50.

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DAVIS v. COAL COMPANY, 34 W. VA. 500.

310,g. *Place for servant to work—Examination of required of master.*

W. Va.; Snyder v. R. R. Co., 11-17.

DAVIS v. COAL COMPANY, 34 W. VA. 500—Continued.

310,h. *Same*—*Liability of master for failure to make examination of.*

311,i. *Same*—*Master's knowledge of danger—Entering dangerous place by servant under direction of master.*

W. Va.; Snyder v. R. R. Co., 11-17.

DAVIS v. LIVING, 50 W. VA. 431.

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215,a. *Detinue—Title to property.*

W. Va.; Jones v. Reid, 12-350.

Va.; Bank v. Waddill, 27 Gratt. 451; Wiley v. Glvens, 6 Gratt. 277.

DEITZ v. INSURANCE COMPANY, 33 W. VA. 526.

282,c. *Knowledge of insurer as to destruction of property—Refusal to pay loss.*

W. Va.; Sheppard v. Ins. Co., 21-368.

281,b. *Same*—*Declarations of insurer as to refusal to pay loss.*

W. Va.; Sheppard v. Ins. Co., 21-368.

266,b. *Mistake as to name of party insured—Knowledge and acts of agent of insurer.*

W. Va.; Henley v. Menefee, 10-771; Troll v. Carter, 15-567.

Va.; Peyton v. Harmon, 22 Gratt. 266.

267,c. *Same.*

Same authorities.

DETWILER v. GREENE, 1 W. VA. 109.

DICKESHIED v. BANK, 28 W. VA. 340.

241,a. *Gifts causa mortis—What necessary to constitute.*

Va.; Barker v. Barker, 2 Gratt. 344; Brown v. Handley, 7 Leigh. 119; Durham v. Dunkly, 6 Rand. 135; Hunter v. Jones, 6 Ran. 541; Miller v. Jeffries, 4 Gratt. 972; Patterson v. Franklin, 7 Leigh. 590; Shirley v. Long, 6 Ran. 735.

342,b. *Place of gift—Residence of donor and donee.*

Same authorities as above.

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213,a. *Competency of grantor to execute deeds—Mental capacity—Intentions of grantor.*

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W. Va.; Sheff v. Huntington, 16-307; Snyder v. R. R. Co.,
11-14; Washington v. R. R. Co., 17-190.

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326,a. *Care required of servants—Perilous position.*

W. Va.; Baylor v. R. R. Co., 9-270; Washington v. R. R.
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326,b. *Same—Opportunity and duty of servant to avoid perilous position.*

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W. Va.; Downey v. R. R. Co., 28-732.

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W. Va.; Washington v. R. R. Co., 17-190.

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Same authorities as above.

FISHER v. RAILROAD COMPANY, 42 W. VA. 183.

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W. Va.; Butcher v. R. R. Co., 37-180.

143,n. *Concurrent negligence.*

W. Va.; Gerity v. Haley, 29-98.

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86-860; Rudd v. Ry. Co., 80-549.

FOLEY v. CITY OF HUNTINGTON, 51 W. VA. 396.

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W. Va.; McCreary v. R. R. Co., 43-110; Wilson v. Wheeling, 19-232; Yeager v. Bluefield, 40-484.

340,m. *Condition of street and sidewalk at time of injury—Condition of before or after injury.*

Same authorities as above.

FOX v. RAILROAD COMPANY, 34 W. VA. 466.

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W. Va.; Johnson v. Parkersburg, 16-405.

FRANKLIN v. GEHO, 30 W. VA. 27.

399,a. *Forcible entry and detention of lands.*

W. Va.; Hayes v. Altizer, 24-505.

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420,a. *Effect of failure to produce witness.*

W. Va.; Dewing v. Hutton, 48-576; Hefflebower v. Dietrich, 27-16; Trust Co. v. McClellan, 40-405; Gartlan v. Hickman, 56-75.

357,a. *Oil and Gas leases—Machinery and fixtures—Reasonable time given lessee to remove same from leased premises.*

W. Va.; Guffy v. Hukill, 34-49; Steelsmith v. Gartlan, 45-27; Urpman v. Oil Co., 53-51.

GAS COMPANY v. WHEELING, 8 W. VA. 320.

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W. Va.; Burns v. Coal Co., 27-286.

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W. Va.; Tracy v. Cloud, 10-19.

Va.; Crump v. Mining Co., 7 Gratt. 52; Harris v. Nicholas 5 Mun. 483.

GROCERY COMPANY v. WATKINS, 41 W. VA. 787.

354,a. *Negotiable instruments—Joint promisor—When party liable as.*

W. Va.; Burton v. Hansford, 10-470.

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Va.; Newsom v. Newson, 1 Leigh. 86.

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94,a. *Payment of taxes by one holding title under a void judicial sale.*

W. Va.; Bradley v. Ewart, 18-589; Hall v. Hall, 12-1; Lynch v. Andrews, 26-541; Simpson v. Edmiston, 23-675; Sturm v. Fleming, 26-541; Whitman v. Sayers, 9-171.

Va.; Lohr v. Miller, 12 Gratt. 452.

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HALL v. RAILROAD COMPANY, 44 W. VA. 36.

131,f. *Excessive railroad fares—Schedule of rates—Rules of company—Violation of by conductors.*

W. Va.; Gillingham v. R. R. Co., 35-588; Gregory v. R. R. Co., 37-606.

131,g. *Same—Concerning act of conductor in collection of excessive fares.*

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191,h. *Diversion of stream of surface water—Encroachment of stream upon property of land owner.*

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404,a. *Liability for changing the natural course of a stream.*

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405,b. *Rights of defendant when properly on his own ground—Usual condition of stream.*

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405,c. *Same.*

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375,c. *Permanent injuries to real estate—When value of property depreciated.*

W. Va.; Blair v. City of Charleston, 43-62; Quinn v. R. R. Co., 46-151; Stewart v. R. R. Co., 38-438.

193,l. *Permanent injury to real estate by railroad company—Concerning depreciation in value caused by.*

W. Va.; Ball v. Cox, 29-407; Dickens v. Salt Co., 41-511; Talbott v. King, 32-6.

Va.; Sampson v. Goochland, 5 Gratt. 241.

HAWKER v. RAILROAD COMPANY, 15 W. VA. 628.

372,a. *Injuries to animals—Injuries occurring on track.*

W. Va.; Blaine v. R. R. Co., 9-252

HOFFMAN v. DICKINSON, 21 W. VA. 142.

188,b. *Defective machinery and appliances—Knowledge of master as to.*

W. Va.; Burns v. Coal Company, 27-283; Cooper v. R. R. Co., 24-37; Criswell v. Ry. Co., 30-798; Dimmy v. R. R. Co., 27-32.

HOOD v. BLOCK, 29 W. VA. 244.

HOUSTON v. McNEER, 40 W. VA. 365.

112,a. *Assignment of bonds without recourse.*

W. Va.; Crislip v. Cain, 19-438; Robinson v. Welty, 40-385; Wamsley v. Currence, 25-543.

112,b. *Same—Money due at time of assignment.*

Same authorities as above.

112,c. *Same—Effect of written agreement—Risk of collection—Parol evidence.*

Same authorities as above.

HURXTHALL v. BOOM COMPANY, 53 W. VA. 87.

194,o. *Mitigation of damages.*

See, also, Vinal v. Core, 18 W. Va. 4.

HUTCHINSON v. PARKERSBURG, 25 W. VA. 226.

192,j. *Changing grades of streets—Damages resulting from.*

W. Va.; Johnson v. Parkersburg, 16-426.

I.

ILSLEY v. WILSON 42 W. VA. 757.

87,e. *Adverse possession of real estate in third party.*

Va.; Cline v. Caton, 22 Gratt. 392; Korner v. Rankin,
11, Gratt. 427; Overton v. Davisson, 1 Gratt. 223;
Taylor v. Burnside, 1 Gratt. 196.

87,f. *Breach of covenant—Statute of limitations.*

W. Va.; Riddle v. Core, 21-53.

J.

JARRETT v. STEVENS, 36 W. VA. 445.

93,b. *Necessity for connecting title of land—Lengthening possession.*93,c. *Possession limited to color of title—Actual enclosures.*

W. Va.; Adams v. Alkire, 20-480; Oney v. Clendennin, 28-
35, 52.

82,a. *Continuity of possession—Tacking on different adverse possessions.*

Va.; Stonestreet v. Doyle, 75-356.

JOHNSON v. BROWN, 13 W. VA. 71.

291,a. *Libel and slander—Matter published in course of judicial proceedings.*

Va.; Mosley v. Moss, 6 Gratt. 549; Dillond v. Collins,
25 Gratt. 351.

291,b. *Same—Malice towards plaintiff.*

Dillard v. Collins, 25 Gratt. 351.

JOHNSON v. BURNS, 39 W. VA. 658.

JOHNSTON v. BANK, 27 W. VA. 343.

JONES v. RAILROAD COMPANY, 14 W. VA. 514.

JORDAN v. BENWOOD, 42 W. VA. 312.

346,b. *Drains or sewerage for carrying away water from cellars—Concerning requirements of municipal corporation to furnish.*

W. Va.; Mendel v. Wheeling, 28-233; Gillison v. Charles-
ton, 16-282; Knight v. Brown, 25-808.

347,c. *Raising grade of street.*

Same authorities as above.

347,d. *Same—Injuries resulting from other causes.*

Same authorities as above.

392,b. *Same as 346,b.*393,c. *Same as 347,c.*393,d. *Same as 347,d.*

K.

*KERR v. LUNSFORD, 31 W. VA. 659.

418,z4. *When opinions of expert witnesses can be given on testimony already in the case.*

W. Va.; McMechen v. McMechen, 17-683.

KYLE v. HARVEY, 25 W. VA. 716.

L.

LAIDLEY v. LAND COMPANY, 30 W. VA. 505.

214,b. *Defective acknowledgment of married women.*

W. Va.; Blair v. Sayre, 29-604; Laidley v. Knight, 23-741; McMullen v. Egan, 21-245; Pickens v. Kniseley, 29-1.

Va.; Grove v. Trumbo, 14 Gratt. 541; Hairston v. Randolph, 12, Leigh. 445-459; Sister v. McClanahan, 2 Gratt. 280; Todd v. Baylor, 4 Leigh. 498.

LAND COMPANY v. INSURANCE COMPANY, 35 W.

278,b. *Time for making proof of loss—Waiver of proof.*

Va. 666.

W. Va.; Deltz v. Ins. Co., 33-526; Nease v. Ins. Co., 32-283; McFarland v. Ins. Co., 6-435; Sheppard v. Ins. Co., 21-383,

LANDERS v. RAILROAD COMPANY, 46 W. VA. 492.

190,e. *Ejecting persons from freight trains—Carrier's liability for injuries caused by.*

W. Va.; Bess v. Ry. Co., 35-492; Crogan v. Ry. Co., 39-415.

190,f. *Same—Use of needless force in.*

Same authorities as above.

370,a. *In whom power or authority to eject rests.*

370,b. *Same authorities as above.*

138,f. *Special instructions of company as to movement of trains—Acts of conductor when within the scope of his duty and power.*

W. Va.; Bess v. R. R. Co., 35-492.

LANE v. BLACK, 21 W. VA. 617.

101,g. *False representations by agent—Concealment of facts by agent.*

Va.; Crump v. Mining Co., 7 Gratt. 368; Grim v. Byrd, 32 Gratt. 293.

101,h. *Same.*

Same authorities as above.

LAWSON v. CONOWAY, 37 W. VA., 159.

362,a. *Degree of care and skill required of physicians—Special agreement—Inference as to negligence.*

W. Va.; Kuhn v. Brownfield, 34-256.

LAWSON v. DALTON, 18 W. VA. 766.

404,b. *Unlawful entry and detainer—Within what time action must be brought.*

W. Va.; Mann v. Bryant, 12-516.

LEVY v. INSURANCE COMPANY, 58 W. VA. —.

LOGIE v. BLACK, 24 W. VA. 1.

159,i. *Contracts—Additional claims procured through efforts of third parties.*

W. Va.; Seltzer v. Beall, 19-274.

LOWE v. SETTLE, 32 W. VA. 600.

82,e. *Deed conveying title—Effect of delivery of—Adverse possession—What necessary to establish.*

W. Va.; Core v. Faupel, 24-239; Lowe v. Settle, 22-387.

89,b. *Holding by vendee as against vendor—Executory contracts—Future conveyances.*

W. Va.; Core v. Faupel, 24-239.

LUMBER COMPANY v. WARD, 36 W. VA. 573.

M.

MCCREERY v. RAILROAD COMPANY, 43 W. VA. 110.

313,b. *Railroad track and road beds—Duty of master to keep clear of dangerous obstructions.*

W. Va.; Flanagan v. R. R. Co., 40-436; Robinson v. R. R. Co., 40-583.

MCDUGAL v. MUSGRAVE, 46 W. VA. 509.

92,g. *Expiration of landlord's life estate—Tenant's remainder in fee dependent upon.*

W. Va.; Hurst v. Hurst, 7-289.

Va.; Humphrey v. Foster, 13 Gratt. 65.

McMASTER v. DYER, 44 W. VA. 644.

360,d. *Exemplary damages—Definition of.*

W. Va.; Mayer v. Frobe, 40-246, overruling Beck v. Thompson, 31-459, and Pegram v. Stortz, 31-220.

McMECHEN v. McMECHEN, 17 W. VA. 683.

410,j. *Fraud or undue influence in procurement of will—Burden of proof.*

Va.; Pasley v. English, 10 Gratt. 242; Rea v. Trotter, 26 Gratt. 585.

McVEY v. RAILROAD COMPANY, 46 W. VA. 111.

369,m. *Injuries to persons on railroad tracks—Gross negligence—Contributory negligence.*

W. Va.; Newsome v. Ry. Co., 30-228.

McVEY v. St. CLAIR COMPANY, 49 W. VA. 412.

317,a. *Fellow-servant—When superiority and power and authority does not destroy relationship of.*

Citing in general, Jackson v. R. R., 43-380.

MASLIN v. RAILROAD COMPANY, 14 W. VA. 180.

126,d. *Special contracts—Delay in shipment under—Injuries resulting from negligence.*

Va.; R. R. Co. v. Sayers, 26 Gratt. 648.

MASON v. BRIDGE COMPANY, 20 W. VA. 223.

See section 7, Ch. 44 Code.

MAUPIN v. INSURANCE COMPANY, 53 W. VA. 557.

276,x. *Books and papers—Parol waiver of requirements as to where to be kept. "Iron-Safe Clause."*

W. Va.; Ins. Co. v. Board, 49-360.

266,a. *Written agreement exclusive evidence of contract.*

W. Va.; Crislip v. Cain, 19-438; Houston v. McNeer, 40-368; Ins. Co. v. Board, 49-360; Knowlton v. Campbell, 48-294.

MAXWELL v. CUNNINGHAM, 50 W. VA. 298.

81,a. *Color or claim of title—What party relying on under must show.*

W. Va.; Core v. Faupel, 24-238.

88,a. *Entry upon land under title of legal owner—How controverted.*

W. Va.; Core v. Faupel, 24-238.

MAXWELL v. KENT, 49 W. VA. 542.

MAYER v. FROBE, 40 W. VA. 246.

(This case overrules Beck v. Thompson, 31 W. Va. 459, and Pegram v. Stortz, 31 W. Va. 220, as to exemplary damages.)

MAYER v. FROBE, 40 W. VA. 246—Continued.

196,b. *Same—Exemplary damages.*

W. Va.; Battrell v. Ry. Co., 34-232; Riddle v. McGinnis, 22-253.

Va.; Boreland v. Barnett, 76-128.

197,c. *Same, and same authorities as above.*287c. *Exemplary damages.. Same authorities as above.*

MEDLEY v. INSURANCE COMPANY, 55 W. VA. 342.

270,h. *Incumbrances upon property insured—Knowledge of insurer as to..*

W. Va.; Bank v. Ins. Co., 55-261; Bryan v. Ins. Co., 8-605; Miller v. Ins. Co., 12-116; Maupin v. Ins. Co., 53-557.

269,f. *Title or ownership of property insured—Knowledge of insurer as to.*

W. Va.; Cleavenger v. Ins. Co., 47-595; Quarrier v. Ins. Co., 10-507; Wolpert v. Ins. Co., 44-734.

Va.; Ins. Co. v. Neill, 28 Gratt. 389; Ins. Co. v. Rodefer, 97 Va.. 747.

MICHAELSON v. CAUTLEY, 45 W. VA. 533.

MILLER v. PULP COMPANY, 38 W. VA. 558.

213,a. *Injury to water mill by construction of dams and gates.*

W. Va.; Hargreaves v. Kimberly, 26-788; R. R. Co. v. Foreman, 24-662.

MOORE v. DOUGLASS, 14 W. VA. 708.

400,c. *Unlawful entry and detainer—Possession under a lease—Question of title not to be regarded.*

Va.; Olinger v. Shepherd, 12 Gratt. 471.

400,d. *Same—Possession under grantor—Question of boundaries—Prior possession of defendant.*

Same authorities as above.

MOORE v. RAILROAD COMPANY, 41 W. VA. 160.

133,b. *Fraud in procurement of railroad ticket—Right of carrier to rescind contract.*

W. Va.; McKay v. R. R. Co., 34-65.

135,a. *Same—Holding fraudulent ticket—Right of carrier to reject.*

W. Va.; McKay v. R. R. Co., 34-65.

189,d. *Ejecting passengers from passenger trains.*

W. Va.; McKay v. R. R. Co., 34-65.

MOORE v. SHOPPERT, 22 W. VA. 282.

398,a. *Turnpike companies—Adverse interests—Authority of county court.*

W. Va.; Caldwell v. Prindle, 19-604.

398,b. *Same—Unauthorized acts of county court.*

Va.; Garpin v. Thomas, 2 Hen. & Mun. 139.

N.

NEILL v. PRODUCE COMPANY, 41 W. VA. 37.

109,b. *Bills of Lading—Fraudulent transfer—Purpose of—Knowledge of.*

Same authorities as 109,a.

109,a. *Interest in bill of lading or its proceeds.*

W. Va.; Altmeyer v. Caldfield, 37-847; Banking Company v. Buckman, 38-84.

Va.; Mentz v. Henley, 2 Hen. & Mun. 308.

110,e. *Charging draft to account of pledgor—Application of funds of pledgor in bank.*

Same authorities as 109,a.

NICHOLAS v. KERSHNER, 20 W. VA. 251.

403,h. *Favoritism or partiality of testator toward his children.*

W. Va.; Ferrell v. Forney, 4-742.

Va.; Parraman v. Fogle, 11 Gratt. 239; Simmerman v. Songer, 29 Gratt. 24.

409,i. *Fickleness of testator as concerns his children.*

Same authorities as above.

409,g. *Naming of all of testator's children in will—No necessity for.*

407,a. *Legal capacity to make will.*

W. Va.; Jarrett v. Jarrett, 11-584.

407,b. *Capacity to make will—Comparison of as to deeds.*

W. Va.; Jarrett v. Jarrett, 11-584.

407,c. *Old age of itself not sufficient evidence of incapacity.*

W. Va.; Jarrett v. Jarrett, 11-584.

413,i. *Manner of placing testator's name to will—Recognition by testator in presence of attesting witnesses of signature to will.*

W. Va.; McMechen v. McMechen, 17-683; Webb v. Dye, 18-376.

Va.; Cheatham v. Hatcher, 30 Gratt. 56; Jesse v. Parker, 6 Gratt. 57.

NORMILE v. TRACTION COMPANY, 57 W. VA. 132.

- 199,g. *Physical and mental suffering—How damages estimated—Contingent or speculative damages.*

W. Va.; Peters v. Johnson, 50-641.

- 198,f. *Same.*

- 390,f. *Contributory negligence—How responsibility of escaped.*

W. Va.; Dimmy v. R. R. Co., 27-32; Hoffman v. Dickinson, 31-154; Meeks v. R. R. Co., 52-102.

O.

OBER v. STEVENS, 54 W. VA. 354.

- 377,a. *Commission for making sale of real estate.*

W. Va.; Clay v. Deskins, 36-350; Conway v. Sweeny, 24-643; Kennedy v. Ehlen, 31-540.

OLIVER v. RAILROAD COMPANY, 42 W. VA. 703.

- 324,m. *Danger known to servant—Willful encountering danger by.*

W. Va.; Hoffman v. Dickinson, 31-142; Johnson v. Ry. Co., 36-73; Woodell v. Imp. Co., 38-23; Osborn & Co. v. Francis, 38-312.

OVERBY v. RAILROAD COMPANY, 37 W. VA. 524.

P.

PARR v. CURRENCE, 53 W. VA. 524.

- 90,d. *Adverse possession—Holding by co-tenant as adverse to co-tenant—Waiver of rights.*

W. Va.; Bennett v. Pierce, 50-604; Talbott v. Woodford, 48-449.

PARRISH v. CITY OF HUNTINGTON, 57 W. VA. 286.

- 337,f. *Care and caution required of municipal corporation.*

W. Va.; Childrey v. Huntington, 34-557.

- 335,c. *Powers, duties and liabilities of municipal corporations.*

W. Va.; Briggs v. Huntington, 32-55; Chapman v. Milton, 31-384; Gibson v. Huntington, 38-177; Phillips v. Huntington, 31-477; Sheff v. Huntington, 16-307; VanPelt v. Clarksburg, 42-218; Wagoner v. Pt. Pleasant, 42-798; Wilson v. Wheeling, 19-323; Yeager v. Bluefield, 40-484.

PARSONS v. HARROLD, 46 W. VA. 122.

- 391,a. *Suretyship—When payee may elect to hold persons endorsing on back of note as original promisors, or endorsers.*

PARSONS v. HARROLD, 46 W. VA. 122—Continued.

W. Va.; Burton v. Hansford, 10-470; Creigh v. Hedrick, 5-140; Long v. Campbell, 37-665; Milling Co. v. Watkins, 41-787.

PETERS v. JOHNSON, 50 W. VA. 644.

PHILLIPS v. HUNTINGTON, 35 W. VA. 406.

336,d. *Powers, duties and liabilities of municipal corporations—Contributory negligence.*

W. Va.; Childrey v. Huntington, 34-457; Moore v. Huntington, 31-842; Sheff v. Huntington, 16-308; Wilson v. Wheeling, 19-325; Yates v. Grafton, 33-507.

PICKENS v. BOOM COMPANY, 58 W. VA. —.

115,f. *Injury to owner of water mill by construction and use of boom.*

W. Va.; Pickens v. Boom Co., 51-445; Bodkin v. Arnold, 48-108; James v. Adams, 8-568; Miller v. Pulp Co., 30-567; Watts v. R. R., 39-210.

194,n. *Same as 115,f.*

Same authorities.

212,a. *Slackening water-power by causing sediment in stream—Rental value of property damaged—Statute of limitations.*

W. Va.; Bodkin v. Arnold, 48-108; James v. Adams, 8-568; Pickens v. Boom Co., 51-445.

PORTER v. MACK, 50 W. VA. 581.

R.

RAILROAD COMPANY v. OIL COMPANY, 35 W. VA. 205.

150,a. *Lateral lines—Right to construct—Abandonment of work on main line.*

W. Va.; Bridge Company v. Bridge Company, 34-155; Code, ch. 54, sec. 69.

151,d. *Lateral line defined.*

W. Va.; Code, chapter 131, sec. 5.

146,a. *Necessity for taking property—How determined.*

See Gas Co. v. Lowe & Butler, 52 W. Va. 662, citing Salt Co. v. Brown, 7 W. Va. 191.

RAILROAD COMPANY v. SHEPHERD, 26 W. VA. 672.

RAILWAY COMPANY v. BUSKIRK, 57 W. VA. 417.

148,f. *Condemnation proceedings—Location, market value and compensation.*

W. Va.; Stewart v. R. R. Co., 38-438.

RAILWAY CO. v. BUSKIRK, 57 W. VA. 417—Continued.

148,g. *What not to be considered in estimating damages.*

W. Va.; Blair v. Charleston, 43-62; Stewart v. R. R. Co., 38-438.

Va.; McGuire v. Falconer, 10 Gratt. 12; Mitchell v. Thorn, 21 Gratt. 178.

RATHBONE v. RAILROAD COMPANY, 1 W. VA. 87.

123,a. *Special contracts—Shipment under—Recovery under.*

For discussion of this proposition see Maslin v. R. R. Co., 14 W. Va. 206.

REESE v. RAILROAD COMPANY, 42 W. VA. 333.

322,j. *Patent danger—When warning as to not necessary.*

W. Va.; Downey v. R. R. Co., 28-732; Stewart v. Ry. Co., 38-438, and 40-188.

RHODES v. RAILWAY COMPANY, 49 W. VA. 494.

RICHARDS v. IRON WORKS, 56 W. VA. 510.

312,l. *Liability of master for negligent acts of foreman.*

W. Va.; Madden v. R. R. Co., 28-610; Stewart v. R. R. Co., 40-188.

311,j. *Defective materials—Duty of master to furnish reasonably safe and sound material.*

Same authorities as above.

312,k. *Defective workmanship—Accident caused by, though best material be used.*

W. Va.; Johnson v. R. R. Co., 36-73; Knight v. Cooper, 36-232.

RIDDLE v. MCGINNIS, 22 W. VA. 253.

361,a. *Parent and child—Loss of service of minor by parent—Concerning parents' relinquishment of control of minor.*

Va.; Clemm v. Holmes, 33 Gratt. —; Lee v. Hodges, 13 Gratt. 726.

361,b. *Same.*

387,a. *Same as 361,a.*

202,o. *Seduction of minor daughter—Shame, loss of respect and mortification of parent—Same as 361,a.*

RILEY v. RAILROAD COMPANY, 27 W. VA. 145.

333,t. *When right to recover not affected by contributory negligence—Preponderance of evidence.*

W. Va.; Johnson v. R. R. Co., 25-570; Washington v. R. R. Co., 17-214.

313,a. *Railroad tracks—Duty of master to keep clear of dangerous obstructions—What servant has right to presume.*

W. Va.; Cooper v. R. R., 24-37.

ROBINSON v. LOWE, 50 W. VA. 75.

81,c. *Adverse possession—Color of title—Character of deed which gives color of title.*

W. Va.; Adams v. Alkire, 20-480; Covey v. Porter, 22-121;
Core v. Faupel, 24-238; Jackson v. Huntington,
5-402; Jones v. Lemon, 26-630.

Va.; Powell v. Harmer, 2 Peters, 141; Shonks v. Lancaster, 5 Gratt. 110.

ROBINSON v. LOWE, 56 W. VA. 308.

ROGERS v. BOOM COMPANY, 39 W. VA. 272.

ROWAN & COMPANY v. HULL, 55 W. VA. 335.

165,x. *Contracts—Commissions for selling lands—Failure to complete contract—Party responsible for.*

W. Va.; Sturm v. Parrish, 1-125.

377,b. *Consideration of contract for making sale.*

W. Va.; Reynolds v. Tompkins, 23-229.

377,c. *When agent entitled to commission, though sale not made.*

W. Va.; Sturm v. Parrish, 1-125.

ROSENDORFF v. POLING, 48 W. VA. 621.

99,c. *Scope of authority of agent—Ratification of acts of agent by principal.*

W. Va.; Curry v. Hale, 15-867; Dyer v. Duffy, 39-149.

100,d. *Same—Agent's want of authority.*

Same citations as above.

RYLAND v. RAILWAY COMPANY, 55 W. VA. 181.

S.

SAYRE v. EDWARDS, 19 W. VA. 352.

169,a. *Separate contracts—Termination of suit depending upon.*

170,b. *Same—Documentary evidence—Effect of.*

W. Va.; Dickinson v. R. R. Co., 7-413.

Va.; White v. Clay, 7 Leigh. 68.

SCHWARTZ v. SCHULI, 45 W. VA. 405.

202,p. *Explosion of dynamite—Injuries caused by.*

Va.; Zinc Co. v. Martin, 93-791.

233,b. *Admissions of defendant—Negligence.*

Va.; Zinc Co. v. Martin, 93-791.

SEARLES v. RAILWAY COMPANY, 32 W. VA. 370.

129,a. *Carriers of passengers—Duty of railroads to exercise greatest care and diligence.*

SEARLES v. RAILWAY COMPANY, 32 W. VA. 370—Continued.

Va.; Farish v. Riggles, 11 Gratt. 697; R. R. Co. v. Wightman, 29 Gratt. 431.

SHEFF v. CITY OF HUNTINGTON, 16 W. VA. 307.

341,n. *Proximate cause of injury—Remote cause of injury.*

W. Va.; Blaine v. R. R. Co., 9-253.

SHEPPARD v. INSURANCE COMPANY, 21 W. VA. 368.

SHREWSBURY v. TUFTS, 41 W. VA. 212.

156,b. *Contracts by correspondence construed.*

W. Va.; Coal Company v. Richter, 31-858.

158,g. *Statement of accounts—Opportunity to discover errors.*

W. Va.; Ruffner v. Hewitt, 7-585.

Va.; Robertson v. Wright, 17 Gratt. 534; Townes v. Birchett, 12 Leigh. 173.

159,h. *Same—Burden of proof.*

Same authorities as above.

160,l. *Contracts of employment—Interpretation of and acquiescence in.*

Same authorities as in next below.

161,m. *Same—Acquiescence inferred.*

W. Va.; Ruffner v. Hewitt, 7-585.

Va.; Robertson v. Wright, 17 Gratt. 534; Townes v. Burchitt, 12 Leigh. 173.

SIMMONS v. INSURANCE COMPANY, 8 W. VA. 474.

SISK v. HURST, 1 W. VA. 53.

SKEELS v. RAILROAD COMPANY, 3 W. VA. 556.

125,a. *Special contract—As to exemption from liability under.*

W. Va.; Rathbone v. R. R. Co., 1-106.

SKIDMORE v. RAILROAD COMPANY, 41 W. VA. 293.

SMITH v. RAILWAY COMPANY, 48 W. VA. 69.

137,e. *Unauthorized assault on passengers—Disorderly conduct of passenger—Preponderance of evidence.*

W. Va.; Akers v. DeWitt, 41-229; Claiborne v. Ry. Co., 36-363; Gillingham v. R. R. Co., 35-588.

SNODDY v. CITY OF HUNTINGTON, 37 W. VA. 111.

338,h. *Grading and paving streets—Requirements of corporation while improvements being made.*

W. Va.; Brown v. Huntington, 35-682; Chapman v. Milton, 31-387.

SNODDY v. CITY OF HUNTINGTON, 37 W. VA. 111—
Continued.

200,j. *Physical and mental suffering—Exemplary damages.*
W. Va.; Phillips v. City of Huntington, 35-406.

SNYDER v. ELECTRICAL COMPANY, 43 W. VA. 661.

230,j. *Unavoidable accidents—Violation of duty.*

W. Va.; Berns v. Coal Co., 27-285; Clark v. R. R. Co., 39-
732; Poling v. R. R. Co., 38-645.

Va.; R. R. Co. v. Whittington, 30-810.

SPICER v. RAILWAY COMPANY, 34 W. VA. 514.

367,g. *Warning signals—Statutory requirements as to.*

W. Va.; Code, Ch. 54, Sec. 61.

364,b. *Use of track as a foot path—Duty of persons so using to
exercise care and precaution.*

Va.; R. R. Co. v. Sherman, 30 Gratt. 602.

365,c. *Same—Risks assumed by persons using track as a foot-
path.*

W. Va.; Hawker v. R. R. Co., 15-628.

Va.; R. R. Co. v. Harmon, 83-554.

360,d. *Requirements to look for approaching trains—Contribu-
tory negligence.*

W. Va.; Beyel v. R. R. Co., 34-538; Hawker v. R. R. Co.,
15-629.

365,e. *Same.*

STATE v. ALLEN, 45 W. VA. 65.

178,b. *Circumstantial evidence—What the circumstances should
exclude.*

W. Va.; State v. Evans, 33-417; State v. Flanagan, 26-116.

257,c. *Previous threats—When they do not justify homicide.*

W. Va.; State v. Abbott, 8-741.

STATE v. ALLEN, 48 W. VA. 154.

106,b. *Party leaving the State not entitled to exemption from
execution.*

Va.; Clark v. Ward, 12 Gratt. 440; Long v. Ryan, 30
Gratt. 718; Moore v. Holt, 10 Gratt. 289.

STATE v. BICKEL, 53 W. VA. 597.

STATE v. BINGHAM, 42 W. VA. 234.

STATE v. BOOM COMPANY, 41 W. VA. 796.

117,j. *Criminal liability of boom owner for obstructing floatable
streams by the construction of dams.*

W. Va.; City of Moundsville v. R. R. Co., 37-92; State v.
R. R. Co., 37-108.

238,d. *Same as 117,j.*

237,a. *What deemed a floatable stream.*

W. Va.; Moundsville v. R. R. Co., 37-92; State v. R. R. Co., 37-108; Watts v. R. R. Co., 39-196.

STATE v. CAIN, 20 W. VA. 679.

253,d. *Apprehension of danger—What to be based on.*

Va.; Stoneman's case, 25 Gratt. 887.

245,e. *How murder in the second degree elevated to murder in first degree.*

Va.; Hill's case, 2 Gratt. 595.

STATE v. CLARK, 51 W. VA. 457.

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